Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

McCREARY COUNTY, KENTUCKY; JIMMIE GREENE as McCreary County Judge Executive; PULASKI COUNTY, KENTUCKY; DARRELL BESHEARS as Pulaski County Judge Executive,
Petitioners.

v.

ACLU OF KENTUCKY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Establishment Clause is violated by a privately donated display on government property that includes eleven equal size frames containing an explanation of the display along with nine historical documents and symbols that played a role in the development of American law and government where only one of the framed documents is the Ten Commandments and the remaining documents and symbols are secular.

2. Whether a prior display by the government in a courthouse containing the Ten Commandments that was enjoined by a court permanently taints and thereby precludes any future display by the same government when the subsequent display articulates a secular purpose and where the Ten Commandments is a minority among numerous other secular historical documents and symbols.

3. Whether the *Lemon* test should be overruled since the test is unworkable and has fostered excessive confusion in Establishment Clause jurisprudence.

4. Whether a new test for Establishment Clause purposes should be set forth by this Court when the government displays or recognizes historical expressions of religion.

PARTIES

The Petitioners consist of McCreary County, Kentucky, and Jimmie Greene as County Judge Executive of McCreary County, and Pulaski County, Kentucky, and Darrell Beshears, as County Judge Executive of Pulaski County.

The Respondents include the American Civil Liberties Union of Kentucky, Louanne Walker and Dave Howe as residents of McCreary County, and Lawrence Durham and Paul Lee as citizens of Pulaski County.

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STATUTES

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OPINIONS BELOW

The opinion of the Court of Appeals (App., 1a - 95a) is reported at 354 F.3d 438. The opinion of the Court of Appeals denying rehearing en banc (App., 189a - 202a) is reported at 361 F.3d 928. The opinion of the District Court in the consolidated case of *ACLU v. McCreary County* (App., 96a - 114a) granting a supplemental preliminary injunction is reported at 145 F. Supp. 2d 845. The opinion of the District Court in *ACLU v. McCreary County* (App., 115a - 138a) granting a preliminary injunction is reported at 96 F. Supp. 2d 679. The opinion of the District Court in *ACLU v. Pulaski County* (App., 139a - 162a) granting a preliminary injunction is reported at 96 F. Supp. 2d 691.

JURISDICTION

The judgment of the Court of Appeals was filed on December 18, 2003. The Court of Appeals denied rehearing en banc on March 23, 2004. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case raises issues involving the Establishment Clause of the First Amendment to the United States Constitution.

STATEMENT OF THE CASE

"[G]overnment can, in a discrete category of cases, acknowledge or refer to the divine without offending the Constitution." *Elk Grove Unified Sch. Dist. v. Newdow*,

concurring slip op. at 5 (O'Connor, J., concurring). This case presents one of those circumstances. This is one of those cases where "some references to religion in public life and government are the inevitable consequence of our Nation's origins." *Id.* at 3. The Defendants have attempted to display documents and symbols on the origin of American law and government. Inevitably, such a display will include religious references without violating the Constitution.

This case began as a challenge to displays containing the Ten Commandments brought by the American Civil Liberties Union of Kentucky and several Kentucky citizens ("Plaintiffs"). The Plaintiffs filed three separate complaints and motions for preliminary injunction on November 18, 1999, against McCreary and Pulaski Counties and the Harlan County School District.[1] The complaints originally challenged a display in McCreary and Pulaski Counties consisting of a single copy of the Ten Commandments. (App., 6a).

Shortly after the lawsuit was filed, and before a hearing on the motions, the Defendants amended the displays in an attempt to bring them within constitutional boundaries. (App., 7a) ("Second Display"). The Second Display consisted of the following:

(1) An excerpt from the Declaration of Independence.
(2) The Preamble to the Kentucky Constitution.
(3) The National Motto of the United States.

[1]Harlan County has separately petitioned this Court for a Writ of Certiorari due to the constitutional and factual differences involved in that case.

(4) A page from the Congressional Record dated February 2, 1983, declaring 1983 to be the year of the Bible and containing a copy of the Ten Commandments.
(5) A proclamation by President Lincoln declaring a National Day of Prayer.
(6) A quote from President Lincoln that stated, "The Bible is the best gift God has ever given to man."
(7) A proclamation by President Reagan proclaiming 1983 the year of the Bible.
(8) The Mayflower Compact.

(App., 7a). Most of the documents were included in their entirety, but the excerpted portions of the Declaration of Independence and the quote from President Lincoln presented primarily the religious references in the documents. *Id.*

The Plaintiffs pursued their requests for a preliminary injunction despite the modifications to the displays, and the District Court held a hearing on April 20, 2000. On May 5, 2000, the District Court entered separate orders granting preliminary injunctions and ordering that the displays be removed immediately and that no similar displays be erected in the future. (App., 8a, 137a-138a, 161a-162a).

After the initial Preliminary Injunctions were entered, the Defendants hired new counsel and filed a Motion to clarify the District Court's Injunction so as to determine whether any of the documents could ever be re-posted in a constitutional

manner.[2] (App., 4a). The District Court denied the Motion to Clarify stating that "the injunction speaks for itself." *Id.*[3]

Defendants modified the displays again in an attempt to bring them within constitutional boundaries. ("Third Display"). The Third Display contained the following ten documents placed in eleven equal size frames:

(1) The full text of the Declaration of Independence (App., 190a-195a).
(2) The entire lyrics of the Star Spangled Banner (App. 185a-186a).
(3) The full text of the Mayflower Compact (App., 188a).
(4) The full text of the Bill of Rights (App., 196a-198a).
(5) The full text of the Magna Carta (App. 199a-212a) (contained in two equal frames).[4]
(6) The complete National Motto (App. 184a).
(7) The entire Preamble to the Kentucky Constitution (App. 184a).
(8) The full text of the Ten Commandments (App., 189a).

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[2]Defendants also filed a Notice of Appeal with the Sixth Circuit. This appeal was dismissed voluntarily after the Defendants modified the display again. (App., 4a).

[3]At a subsequent hearing, the District judge acknowledged that the order barring "no similar displays" was unclear. (Joint Appendix on appeal to Sixth Circuit at 220).

[4]The Magna Carta was displayed in two frames due to size.

(9) A picture of Lady Justice (App. 187a).
(10) An explanatory document entitled "The Foundations of Law and Government Display" explaining the significance of each of the documents in the display (App., 206a-210a).

(App., 9a-10a, 206a-212a). The explanatory document states that the "display contains documents that played a significant role in the foundation of our system of law and government." (App., 10a, 60a, 206a). Among other descriptions, the explanatory document describes the Declaration of Independence as "[p]erhaps the single most important document in American history." (App. 207a). The Magna Carta is described as, "By signing Magna Carta, King John brought himself and England's future rulers within the rule of law." (App. 208a). The document also describes the Ten Commandments by stating:

> The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence which declared that "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness." The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.

(App. 207a).

None of the documents are set apart or have any greater prominence than any other document. (App., 60a, 178a, 179a). Each of the documents is placed in a frame that is exactly the same size. The Ten Commandments is only one of eleven equal sized frames. *Id.* Each of the County Courthouses also contains numerous other historical documents on display *in addition* to the Third Display. In McCreary County, there are 58 historical documents posted in the Judge's office, 41 in the waiting room, 124 in the side entrance to the courthouse, 33 in the fiscal courtroom, and 28 in the conference room. (Record on appeal to Sixth Circuit #5, Mem. in Support of Motion to Dismiss at 6). Likewise, the Pulaski County courthouse, as part of its 200th anniversary of the County, posted numerous historical documents in the Judge's office, in the waiting room, in the side entrance to the courthouse, in the fiscal courtroom, and in the conference room. (Record on appeal to the Sixth Circuit #6, Mem. in Support of Motion to Dismiss at 6).

After the Third Display was erected, the Plaintiffs filed a Motion in the District Court seeking a supplemental preliminary injunction. The District Court issued a supplemental preliminary injunction and ordered that the Third Displays be removed immediately. (App., 113a-114a).

Defendants appealed and a divided panel of the Sixth Circuit affirmed in a fractured opinion. (App., 1a-95a). Two judges found the Third Display violated the purpose prong of *Lemon v. Kurtzman,* 403 U.S. 602 (1971). (App., 16a-42a). The judge who wrote the opinion commented on the effects prong, but no one joined him. (App. 51a). One judge dissented and would have held that the Third Display was constitutional. (App., 52a-95a). The court held that the

Defendants must "present the Ten Commandments objectively and integrate them with a secular message." (App., 22a). The court also held that the constitutionality of the display must be judged by viewing the content of the display, the context of the display and the evolution of the displays. (App., 24a). In viewing the content of the display, the court held that the content of the displays did nothing to detract from the religious nature of the Ten Commandments because the historical documents did not demonstrate an "analytical or historical connection with the other documents." (App., 24a-34a). The court held the context of the display was religious because the Ten Commandments was "blatantly religious" and was not a "passive symbol" of religion. (App. 35a). Finally, the court held that the evolution of the display demonstrated that the Defendants' actions had an "unconstitutional taint" because of the original display. (App., 41a). The court held the display lacked a secular purpose. (App., 42a). The dissent would have upheld the Third Display based on *Lynch* and *Allegheny*. (App., 52a-95a). The dissent took particular exception with the court's requirement that the Defendants establish an analytical and historical link between the Ten Commandments and the other documents on display, pointing out that neither *Lynch* nor *Allegheny County* require such a connection. (App., 76a-82a).

Defendants sought rehearing en banc, and in an opinion dated March 23, 2004, the Sixth Circuit denied the Petition for rehearing en banc with the judge who wrote the majority opinion concurring and two judges dissenting, in which they pointed out that the decision conflicted with precedent of this Court and the Sixth Circuit. (App., 96a-109a). The dissent from the denial of rehearing found troubling the opinion's requirement of a historical and an analytical connection and

the opinion's treatment of the past history of the display as "tainting" the present display. (App., 172a-175a). The dissent wrote that no court has ever required an analytical or historical connection and that the history of the displays is entitled to "considerably less weight than the majority gives it." (App. 173a-174a). The dissent scoffed at the novel "theory of indelible, unconstitutional 'taint.'" (App. 83a). The dissent correctly stated, "We have explicitly rejected the idea that the government's past unconstitutional conduct forever taints its actions in the future." (App. 84a).The dissent correctly pointed out that the decision conflicted with precedent of this Court and the Sixth Circuit. (App., 96a-109a).

REASONS FOR GRANTING THE PETITION

I.

THE SIXTH CIRCUIT'S OPINION CONFLICTS WITH THE THIRD, FIFTH, TENTH AND ELEVENTH CIRCUITS AND THE COLORADO SUPREME COURT.

The Sixth Circuit's opinion conflicts with the Third Circuit's decision in *Freethought Society v. Chester Cty.*, 334 F.3d 247 (3d Cir. 2003), the Fifth Circuit's decision in *Van Orden v. Perry*, 351 F.3d 173 (5th Cir. 2003), the Tenth Circuit's decisions in *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973) and *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002), the Eleventh Circuit's decision in *King v. Richmond Cty.*, 331 F.3d 1271 (11th Cir. 2003) and the Colorado Supreme Court's decision in *Colorado v. Freedom From Religion Foundation, Inc.*, 898 P.2d 1013

(Col. 1995).

The Third Circuit upheld a stand alone bronze Ten Commandments plaque that had been on a county courthouse since 1920. *Freethought Society*, 334 F.3d. at 250. "While the Ten Commandments are undeniably religious, the Supreme Court has held that the context of an otherwise religious display can render the message of the overall display as not endorsing religion." *Id.* at 263.The court stated that a reasonable observer aware of the history of the plaque would not perceive endorsement. *Id.* at 265. The court held that the county had a secular purpose of displaying the Ten Commandments as a key source of our laws. "Given the relatively low threshold required by the purpose prong of *Lemon* (the purpose of the display does not have to be exclusively secular and courts normally defer to the stated purpose of the display), it would appear that the Commissioners' articulations are sufficient to demonstrate a legitimate secular purpose." *Id.* at 267 (citation omitted). The Third Circuit conflicts with the Sixth Circuit regarding the purpose prong and the perception of a reasonable observer regarding the Ten Commandments.

In *Van Orden*,[5] the Fifth Circuit upheld a granite monument containing the Ten Commandments on the Texas State Capitol grounds. *Van Orden*, 351 F.3d at 173. The Ten Commandments monument was placed on the Capitol grounds in 1961 after the State accepted it as a gift from the Fraternal Order of Eagles. *Id.* at 176. The Capitol grounds contain sixteen other monuments regarding Texas history

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[5]The *Van Orden* case is currently pending before this Court on a Petition for Writ of Certiorari. *See* Case No. 03-1500.

spread throughout a large area. *Id.* The Fifth Circuit held that the monument was accepted by the State with the secular purpose of honoring the efforts of the Eagles to reduce juvenile delinquency. *Id.* at 178-79. The court rejected the argument that the State had a religious purpose because the Ten Commandments has a religious message. *Id.* at 179-80.

In contrast, the Sixth Circuit's opinion held that the Ten Commandments has a religious message and that the Defendants did nothing to "integrate the Ten Commandments with a discussion or display of a secular subject matter." (App., 33a). The Sixth Circuit, in conflict with the Fifth, required a demonstration of an "analytical connection" between the Ten Commandments and a secular subject matter.

The Sixth Circuit also conflicts with the Tenth Circuit's decisions in *Anderson* and *Summum*. In *Anderson*, the court upheld a stand alone Ten Commandments monument on city-county courthouse grounds. *See Anderson*, 475 F.2d at 30. The court found the monument had a secular purpose and effect even though one of the articulated purposes of the monument was "to inspire respect for the law of God...." *Id.* at 33. "[W]e cannot say that the monument, as it stands, is more than a depiction of a historically important monument with both secular and sectarian effects." *Id.* at 34. The Tenth Circuit recently affirmed *Anderson* in *Summum*. *See Summum*, 297 F.3d 995, 999-1000 (10th Cir. 2002) (upholding Ten Commandments); *see also Society of Separationists v. Pleasant Grove City*, Case No. 2:03-CV-839-J (D. Utah May 28, 2004) (upholding Ten Commandments in city park), *available at* http://www.utd.uscourts.gov/reports/ 00000034.pdf (last

visited June 17, 2004).

The Eleventh Circuit's decision in *King*, 331 F.3d at 1271, also conflicts with the Sixth Circuit. In *King*, the court upheld the Ten Commandments on a city seal. The Richmond County seal had been used since 1872 and contained an outline of the Ten Commandments, a sword and the name of the court. *Id.* at 1273. The court held the seal had a secular purpose because the Ten Commandments was a recognizable symbol of law and that the use of the seal to validate legal documents, the use of other symbols on the seal, the small size of the seal and the length of time the seal had been used did not send a message of endorsement. *Id.* at 1282-86.

In *Colorado v. Freedom From Religion Foundation, Inc.*, 898 P.2d 1013 (Col. 1995), the Colorado Supreme Court upheld a stand alone Ten Commandments in a state park. After finding that the Ten Commandments was one of the "smallest and least conspicuous" displays in the park and that "in the immediate vicinity" was a larger statue and a monument, the court held that the "content and the context of the monument negate[s] any suggestion that the government is endorsing religion." *Id.* at 1025.

If the Ten Commandments may be displayed as a symbol of secular law, then they may be displayed as *one* of the documents that has played a role in the founding of our system of law and government. If a stand-alone monument of the Ten Commandments has a secular purpose and does not endorse religion, then how much more does the Third Display have a secular purpose because the Ten Commandments are dwarfed by other secular historical documents.

The Third, Fifth, Tenth and Eleventh Circuits and the Colorado Supreme Court conflict not only with the Sixth Circuit, but also with the Sixth, Seventh and Eleventh Circuits as well as numerous District Court decisions.[6] Cases in the Sixth Circuit have reached conflicting results. *See Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002) (striking down Ten Commandments on Capitol grounds in a 2-1 decision); *ACLU v. Hamilton Cty.*, 202 F. Supp.2d 757 (E.D. Tenn. 2002) (striking down single copy of Ten Commandments in courtroom); *ACLU v. Grayson Cty.*, 2002 WL 1558688 (W.D. Ky. 2002) (striking down Ten Commandments with other historical documents); *ACLU v. Ashbrook*, 211 F. Supp.2d 873 (N.D. Ohio 2002) (striking down Ten Commandments in courtroom); *ACLU v. Rutherford Cty.*, 209 F. Supp.2d 799 (M.D. Tenn. 2002) (striking down Ten Commandments with other historical documents under purpose prong but upholding under effects prong); *ACLU v. Mercer Cty.*, 240 F. Supp.2d 623 (E.D. Ky. 2003) (upholding Ten Commandments with other historical documents).

Cases in the Seventh Circuit have held displays of the Ten Commandments unconstitutional. *See Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000) (striking down Ten Commandments monument in a 2-1 decision); *Indiana Civil Liberties Union, Inc. v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001) (striking down Ten Commandments monument in a 2-1 decision); *Kimbley v. Lawrence County*, 119 F. Supp.2d 856 (S.D. Ind. 2000) (striking down Ten Commandments

[6] The Eighth Circuit held in one case that a display of a Ten Commandments monument violated the Establishment Clause. *See ACLU v. Plattsmouth*, 358 F.3d 1020 (8th Cir. 2004) However, that case has been vacated pending rehearing en banc.

monument on courthouse lawn); *Mercier v. City of La Crosse*, 276 F. Supp. 2d 961 (W.D. Wis. 2003) (striking down City's sale of property containing Ten Commandments to private group and finding unconstitutional).

Cases in the Eleventh Circuit have reached conflicting results. While *King* upheld a Ten Commandments display, other cases have struck them down. *See Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003) (striking down Ten Commandments monument in Alabama Supreme Court building); *Harvey v. Cobb County*, 811 F. Supp. 669 (N.D. Ga. 1993) (striking down Ten Commandments in courthouse but allowing county to modify the display); *Turner v. Habersham Cty.*, 290 F. Supp. 2d 1362 (N.D. Ga. 2003) (striking down Ten Commandments in county courthouse).

Other District Court cases have likewise reached divergent results. *See Ring v. Grand Forks Public Sch. Dist. No. 1*, 483 F. Supp. 272 (D.N.D. 1980) (striking down statute requiring display of Ten Commandments in classrooms); *Suhre v. Haywood County*, 55 F. Supp.2d 384 (W.D.N.C. 1999) (upholding Ten Commandments displayed with other items in courtroom).

The Circuits are fractured over displays containing the Ten Commandments. Some of these decisions with opposing holdings contain exactly the same Ten Commandments displays (either stand alone or with historical documents). This Court should resolve the conflict and establish clarity to the Establishment Clause jurisprudence.

II.

THE SIXTH CIRCUIT'S OPINION CONFLICTS WITH THIS COURT'S PRECEDENT REGARDING THE DISPLAY OF RELIGIOUS SYMBOLS.

The Sixth Circuit conflicts with this Court's precedent in *Lynch v. Donnelly*, 465 U.S. 668 (1984) and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

This Court has stated that government may display a religious symbol in connection with other secular symbols and doing so avoids the appearance of endorsement of religion. *See Lynch* and *County of Allegheny*. In *Lynch*, this Court, in a fractured opinion, upheld the constitutionality of a nativity scene in a Christmas display that also contained such items as a Santa Claus house, a Christmas tree and a "Season's Greetings" banner. *Id.* at 671. This Court held that the inclusion of a nativity scene in the Christmas display did not send a message of endorsement of religion because, "The display celebrates a public holiday, and no one contends that declaration of that holiday is understood to be an endorsement of religion. The holiday itself has very strong secular components and traditions." *Id* at 692 (O'Connor, J., concurring).

In *County of Allegheny*, this Court upheld the display of a Menorah in a seasonal display, but struck down the display of a creche. The creche was held unconstitutional because it was by itself on the Grand Staircase of the county courthouse, but, "No figures of Santa Claus or other decorations appeared on the Grand Staircase." *Id.* at 580-81. In contrast, the

Menorah was displayed with a Christmas tree. *Id.* at 581. With regard to the creche, the Court stated that, "nothing in the context of the display detracts from the creche's religious message." *Id.* at 598. With regard to the Menorah, this Court held that the inclusion of a Christmas tree and a sign saluting liberty would not lead a reasonable observer to believe that the county was endorsing religion. *Id.* at 620.

In contrast to these cases, the Sixth Circuit held that the inclusion of the Ten Commandments with other secular symbols and documents had only a religious purpose, in part, because the Ten Commandments was "blatantly religious" and was not a "passive symbol" of religion. (App. 35a). This decision conflicts with *Lynch* and *County of Allegheny*. The opinion turns Establishment Clause jurisprudence on its head and requires that the Defendants affirmatively establish an "analytical and historical link" between the documents on display. Neither *Lynch* nor *County of Allegheny* required the affirmative demonstration of a link. Indeed, if Frosty the Snowman and Santa Claus are analytically and historically linked to a nativity scene, then so are the Ten Commandments linked with the historical documents in this display. Requiring the Defendants to demonstrate an analytical and historical link (whatever that means) between the documents in the display completely side-steps the objective reasonable observer test and places a subjective, unreasonable observer (someone who must be convinced, instead of someone who merely objectively views the display) in its place.[7] As Justice

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[7]The Sixth Circuit majority decided the case on the purpose prong, yet the decision discusses a reasonable observer. In *Americans United for Separation of Church and State v. Grand Rapids*, 980 F.2d 1538, 1542-45 (1992) (en banc), and *Granzeier*

O'Connor recently stated:

> Given the dizzying religious heterogeneity of our Nation, adopting a subjective approach would reduce the test to an absurdity. Nearly any governmental action could be overturned as a violation of the Establishment Clause if a "heckler's veto" sufficed to show that its message was one of endorsement. Second, because the "reasonable observer" must embody a community ideal of social judgment, as well as rational judgment, the test does not evaluate a practice in isolation from its origins and context. Instead, the reasonable observer must be deemed aware of the history of the conduct in question, and must understand its place in our Nation's cultural landscape.

Elk Grove Unified Sch. Dist. v. Newdow, concurring slip op. at 2-3 (June 14, 2004) (O'Connor, J., concurring). The reasonable observer is "deemed aware of the history and context of the community and forum in which the religious display appears." *Capitol Square Rev. and Advisory Bd. v. Pinette*, 515 U.S. 753, 779-780 (1995) (O'Connor, J., concurring). In discussing the reasonable observer in the context of a display of a religious document or symbol, this Court has also stated:

> There is always someone who, with a particular quantum of knowledge, reasonably might perceive a particular action as an endorsement of religion. A State has not made religion relevant to standing in the political community simply because a particular viewer of a display might feel uncomfortable. It is for this reason that the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears. As I explained in *Allegheny*, "the 'history and ubiquity' of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion." **Nor can the knowledge attributed to the reasonable observer be limited to the information gleaned simply from viewing the challenged display.**

Pinette, 515 U.S. at 780 (emphasis added). The Sixth Circuit's opinion fell into the trap of assuming that the reasonable observer was either ignorant or bent on a mission to eradicate religious symbols. Instead, the reasonable observer is deemed aware of the history and ubiquity of the challenged practice.

Understanding the history and widespread use of the documents in the display focuses the objective observer on over three hundred years of history and use and prevents a

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v. Middleton, 173 F.3d 568, 573 (6th Cir. 1999), the Sixth Circuit ruled that the reasonable observer is relevant only on the effects prong. From this Court's decisions it is not clear whether the reasonable observer is relevant to the purpose prong. *See Lynch*, 465 U.S. at 690-91 (O'Connor, J., concurring) (stating that the inquiry under the purpose prong is whether the government intends to send a message of endorsement); *County of Allegheny*, 492 U.S. at 623 (O'Connor, J., concurring) (applying endorsement test but not applying purpose prong).

"heckler's veto" by an observer who is not reasonable and who simply is unaware of what this Court has stated numerous times: that the Ten Commandments have played a role in the founding of our system of law and government. *See Griswold v. Connecticut*, 381 U.S. 479, 529 n.2 (1965) (Stewart, J., dissenting) (most criminal prohibitions coincide with the prohibitions contained in the Ten Commandments); *McGowan v. Maryland*, 366 U.S. 420, 459 (1961) (Frankfurter, J., concurring) ("Innumerable civil regulations enforce conduct which harmonizes with religious canons. State prohibitions of murder, theft and adultery reinforce commands of the decalogue."); *Stone v. Graham*, 449 U.S. 39, 45 (1980) (Rehnquist, J., dissenting) ("It is equally undeniable ... that the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World."); *Lynch*, 465 U.S. at 677-78 (describing the depiction of Moses with the Ten Commandments on the wall of the Supreme Court chamber and stating that such acknowledgments of religion demonstrate that "our history is pervaded by expressions of religious beliefs...."); *Edwards v. Aguillard*, 482 U.S. 578, 593-94 (1987) (acknowledging that the Ten Commandments did not play an exclusively religious role in the history of Western civilization).

The reasonable observer is aware of the impact of religion on our society and does not view the Ten Commandments and historical documents display on a clean slate, but is charged with knowledge of the role of religion in American law and government. This Court made clear in *Lynch* and *Allegheny* that the reasonable observer is an objective test and demonstrates someone who understands the history and ubiquity of a practice and does not need an "analytical

connection" explanation. The dissent noted in the Sixth Circuit opinion:

> Thus, neither *Lynch*, nor *Allegheny*, nor any other decision, and certainly not *Stone*, support the majority's rule that a government that wishes to use a religious symbol in a public display must integrate that symbol into a secular curriculum. As if the absence of authority were not enough, common sense militates against such a rule. Government monuments and displays appear in a context in which the displays must speak for themselves, for they do not present an opportunity to attach lengthy disclaimers and statements of purpose.

(App., 81a).

This Court has never mandated that a governmental display contain an "analytical link" between the documents on display. Instead, this Court's precedent requires that the display, when viewed by an informed reasonable observer, not convey a message of endorsement. The Sixth Circuit replaces the objective observer with a subjective, unreasonable observer.

III.

THE SIXTH CIRCUIT'S OPINION CONFLICTS WITH THIS COURT'S PRECEDENT ON THE PAST HISTORY OF A CHALLENGED PRACTICE.

The Sixth Circuit's opinion also conflicts with precedent

from this Court concerning the past history of a display of religious symbols. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294 (2000) and *Edwards v. Aguillard*, 482 U.S. 578 (1987). The Sixth Circuit's opinion demands that, when viewing the purpose of a governmental action, the history of the display must be taken into account, and that any negative history forever taints future displays.(App., 22a). The Sixth Circuit's opinion actually conflicts with *Santa Fe* and *Edwards*.

In *Santa Fe*, the School District had a long-standing practice of a student giving a prayer over the loudspeaker before football games. *See Santa Fe*, 530 U.S. at 294. The District, during the course of litigation, adopted four separate policies. *Id.* at 296-98. The last Policy the District adopted was termed the "October Policy". *Id.* at 298. In reviewing the constitutionality of the October Policy, the Court reviewed the purpose in light of the "text and history" of the October Policy. *Id.* at 308. The Court stated, "When a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of courts to 'distinguis[h] a sham secular purpose from a sincere one.'" *Id.* In conducting the inquiry into whether the enunciated purpose of the October Policy was insincere or a sham, the Court stated:

> According to the District, the secular purposes of the policy are to "foste[r] free expression of private persons ... as well [as to] solemniz[e] sporting events, promot[e] good sportsmanship and student safety, and establis[h] an appropriate environment for competition." We note, however, that the District's

> *approval of only one specific kind of message*, an "invocation," is not necessary to further any of these purposes. Additionally, the fact that *only one student is permitted to give a content-limited message* suggests that this policy does little to "foste[r] free expression."

Id. at 309 (citations omitted) (emphasis added).

The *Santa Fe* Court held that the October Policy's enunciated secular purpose was insincere or a sham because the enunciated secular purpose and what, in actuality, was occurring at the football games did not "match up." The District's Policy of allowing one student access to the microphone for the sole purpose of giving an invocation, the content of which was severely limited by the Policy did not "match up" with the District's assertion that it was promoting student free speech. This Court, when viewing the inconsistency between enunciated purpose and actual conduct, stated, "The District further asks us to accept what is obviously untrue: that these messages are necessary to 'solemnize' a football game and that this single-student, year-long position is essential to the protection of student speech." *Id.* at 315. Additionally, even though the school had adopted a new policy, it continued to operate under the old practice. The person selected under the old practice to give the invocation was the same person still giving the invocation under the new policy and the school did not conduct a new student election after the new policy was adopted. The articulated purpose was a sham because the school had not

changed its practice even though it adopted a new policy.[8]

The *Santa Fe* case is similar to *Edwards* where this Court was asked to decide the constitutionality of a Louisiana statute that forbade the teaching of evolution in public schools unless creationism was also taught. 482 U.S. at 581. The Court viewed the articulated secular purpose of the statute and held it was insincere or a sham because the articulated purpose did not "match up" with the terms of the statute. The Court stated:

> True, the Act's stated purpose is to protect academic freedom.... Even if "academic freedom" is read to mean "teaching all of the evidence" with respect to the origin of human beings, the Act does not further this purpose. The goal of providing a more comprehensive science curriculum is not furthered either by outlawing the teaching of evolution or by requiring the teaching of creation science.

Id. at 586. The Court held that because the articulated purpose did not "match up" with the actual practice, it was insincere.

This Court has never allowed the history and evolution of a policy to be a *primary* factor in determining the purpose behind the policy *except* in cases where the articulated secular purpose and the practice in actuality are not congruent. Such

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[8]As the dissent in the Sixth Circuit's case stated, "At most, *Santa Fe* held that a modified policy, or display, cannot be used as a shield to prevent litigation. However, *Santa Fe* does not state that a history of unconstitutional displays can be used as a sword to strike down an otherwise constitutional display." (App., 87a).

is not the case here where the articulated secular purpose is to display documents that played a significant role in the founding of our system of law and government, and where the Ten Commandments is only one of many displays.[9] This purpose, when viewed in light of the actual display is clearly not a sham or an insincere purpose. If the Defendants had articulated a purpose of displaying documents that played a role in the founding of our system of law and government, and then actually displayed a sermon from Billy Graham or the lyrics of a religious song authored in 2004, it would be clear that the articulated purpose and the actual conduct were not congruent leading to the ineluctable conclusion that the articulated purpose was a sham. However, the Defendants in this case accomplished their purpose. The articulated purpose and the actual conduct "match up."

The Sixth Circuit's opinion, in essence, establishes a *per se* rule that whenever government has violated the Constitution in the past, its present actions on the same issue are per se unconstitutional. The dissent termed this novel theory the "theory of indelible, unconstitutional 'taint.'" (App. 83a). The dissent correctly stated, "We have explicitly rejected the idea that the government's past unconstitutional conduct forever taints its actions in the future." (App. 84a). Adopting the Sixth Circuit's "indelible, unconstitutional 'taint'" theory leads to absurd results. How long will a past action taint a government's efforts? What must be done to

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[9]Defendants dispute that they enunciated five different secular purposes throughout this litigation. Instead, the secular purpose has always been to display documents and symbols that had an impact in the development of our system of law and government.

remove the taint? Is a government's protestations of current constitutionality sufficient tor remove the taint? Indeed, the Sixth Circuit's "indelible, unconstitutional 'taint'" theory seems to be punitive in nature.

The dissent in the Sixth Circuit opinion stated that "the majority seems to envision a display that contains a recounting of the history of the nation's founding, a summary of American constitutional law and history, perhaps a syllogism incorporating the foregoing, and, I suppose, at least as much evidence as was presented to this court in the official record of more than 200 pages." (App., 76a-77a). The dissent further observed that "in order to integrate the Ten Commandments into a secular curriculum in a manner that would satisfy the majority's new rule, the defendants would have to append to their displays a library of learned treatises and court briefs, or perhaps audio or video accompaniment, explaining beyond all reasonable doubt and in great detail what most Americans already know and the courts have expressly recognized: that 'the Ten Commandments no doubt has played a role in the secular development of our society.' Books [*v. City of Elkhart*, 235 F.3d 292, 302 (7th Cir. 2000)]." (App., 81a-82a).

The conflict with the Sixth Circuit's opinion is clear when viewed in light of this Court's statements that the line between constitutional and unconstitutional conduct "is merely a 'blurred, indistinct, and variable barrier,' which 'is not wholly accurate' and can only be 'dimly perceived.'" *Wallace v. Jaffree*, 472 U.S. 38, 107 (1985)(*citing Lemon*, 403 U.S. at 614; *Tilton v. Richardson*, 403 U.S. 672 (1971); *Wolman v. Walter*, 433 U.S. 229, 236 (1977); *Lynch*, 465 U.S. at 673). This Court should accept this case to correct this

error.

IV.

THE SIXTH CIRCUIT'S OPINION CONFLICTS WITH A PRIOR DECISION FROM THE SAME CIRCUIT AND WITH THE THIRD AND SEVENTH CIRCUITS ON THE EFFECT OF A GOVERNMENTAL ENTITY'S ALLEGED PAST UNCONSTITUTIONAL PURPOSE.

The legal effect of a governmental entity's past alleged unconstitutional conduct is a question of extreme public importance. The Sixth Circuit's opinion conflicts with a prior decision of the same Circuit, the Third and the Seventh Circuits. The opinion holds that the Defendants' past conduct concerning the displays bears directly on the present purpose, and permanently taints any future displays. (App., 36a-42a). The opinion conflicts with the Third Circuit's decision in *ACLU v. Schundler*, 168 F.3d 92 (3rd Cir. 1999), with the Seventh Circuit's decision in *Metzl v. Leininger*, 57 F.3d 618 (7th Cir. 1995), and with the Sixth Circuit's own opinions in *Granzeier v. Middleton*, 173 F.3d 568 (6th Cir. 1999) and *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002).

In *ACLU v. Schundler*, 168 F.3d 92 (3rd Cir. 1999), the ACLU filed suit to declare a holiday display containing a creche unconstitutional. The original display contained a Menorah and a Christmas tree and had been displayed in front of the City Hall in Jersey City for many decades. *Id.* at 94-95. The District Court enjoined that display and "any substantially similar scene or display." *Id.* at 96. After the injunction, the City erected a modified display that included

a Christmas tree and a Menorah, but also included a creche, Santa Claus, Frosty the Snowman, a sled, Kwanzaa symbols and two disclaimer signs. *Id.* The ACLU moved to hold the City in contempt and also sought a preliminary injunction against the modified display. *Id.* The District Court denied both motions. *Id.* The Third Circuit Court of Appeals came to the opposite conclusion of the Sixth Circuit in this case. The Plaintiffs argued that the inclusion of secular symbols was "a ploy designed to permit continued display of the religious symbols." *Id.* at 105. In response the Third Circuit stated:

> The suggestion seems to be that, even if Jersey City could have properly erected the modified display in the first place, the City's initial display, which was held to violate the Establishment Clause, showed that the City officials were motivated by a desire to evade constitutional requirements and that this motivation required invalidation of the modified display. Asked during oral argument whether this meant that Jersey City might be precluded from erecting a display identical to one that would be permissible in other nearby cities, *counsel for the plaintiffs insisted that Jersey City's "prior history" would have to be taken into account, at least until the time came when it could be considered to be "purged" of the "prior constitutional taint*." Oral Arg. Tr. at 27.

We reject this argument. The mere fact that Jersey City's first display was held to violate the Establishment Clause is plainly insufficient to show that the second display lacked "a secular legislative purpose," or that it was "intend[ed] to convey a message of endorsement or disapproval of religion."

Id. at 105 (citations omitted) (emphasis added). The Third Circuit went on to explain:

> The plaintiffs' position is also contrary to the Supreme Court's treatment of the two displays at issue in *Allegheny County*. If the plaintiffs' view were correct, the erection of the unconstitutional display on the Grand Staircase of the County Courthouse should have militated in favor of also striking down the display in front of the City-County Building, but a majority of the Supreme Court sustained that display, and not one Justice took the position that the officials' miscalculation regarding the Grand Staircase tainted the decision concerning the City-County Building.

Id. at 105 n.12.

The Third Circuit has clearly rejected the approach taken by the Sixth Circuit in this case. One misstep in the Establishment Clause minefield should not spell disaster for future conduct. If a past mistake casts a looming shadow over the future, then when can the government move from under the shadow? Once the District Court in this case issued a preliminary injunction, the Defendants were faced with the question of how to remedy their conduct to bring themselves within constitutional boundaries. They could either completely remove the displays, or follow the approach taken by Jersey City in *Schundler* and modify the displays. Either option is a valid means of correcting a constitutional violation. Adopting the Sixth Circuit's rationale would lead to a host of unanswerable questions such as, how long is long enough before a new display may be erected, does there have to be an intervening change in the governing body before the

"taint" is "purged," or does the government have to seek approval from the Court before it may put up a new display. The Defendants must be allowed to correct a prior unconstitutional wrong. Otherwise, one governmental body could erect an identical display absent the prior history and have the display upheld. *See ACLU v. Rutherford Cty.*, 209 F. Supp.2d 799 (M.D. Tenn. 2002) (striking down identical display as here under the purpose prong but upholding under effects prong where the government had a prior resolution that was never acted upon calling for the display of the Ten Commandments);*ACLU v. Mercer Cty.*, 240 F. Supp.2d 623 (E.D. Ky. 2003) (upholding the identical display as here under both the purpose and effects prong where the courthouse had no prior history with the Ten Commandments display).

In *Metzl v. Leininger*, 57 F.3d 618 (7th Cir. 1995), the Seventh Circuit struck down a statewide Good Friday closing law because it was intended to advance a religious holiday. However, even though the Court had just struck down the Good Friday closing law on the grounds that it advanced a religious purpose, Judge Posner reasoned that the State of Illinois could continue with the Good Friday closing by adopting a secular rationale for the closing. Judge Posner stated, "And we have left open the possibility that Illinois can accomplish much the same thing either by officially adopting a 'spring weekend' rationale for the law, in place of the governor's proclamation of a state religious holiday, or by moving to a system of local option for school districts." *Id.* at 623-24. *Metzl* recognized what the Sixth Circuit did not that a previous unconstitutional purpose does not forever "taint" a governmental action and that it is possible for government to correct an unconstitutional purpose. Similarly, in striking down a Ten Commandments display, the Seventh Circuit

allowed the display to be modified, noting the state of Indiana "retains the authority to make decisions regarding the placement of the monument." *Books v. City of Elkhart*, 235 F.3d 292, 307 (7th Cir. 2000).

In *Granzeier v. Middleton*, 173 F.3d 568 (6th Cir. 1999), the Sixth Circuit was asked to decide whether closing governmental offices for Good Friday violated the Establishment Clause. *Id.* at 571. In 1996, shortly before the plaintiffs in that case filed their lawsuit, a governmental official had posted a sign that depicted a crucifix and stated that the offices were closed in observance of Good Friday. *Id.* The defendants in that case admitted that the signs were unconstitutional and promised to never post them again. *Id.* The plaintiffs, however, argued that the government's articulated purpose for closing the offices on Good Friday (that the weekend had turned into a spring weekend with little activity and many people on vacation) was a sham because of the posting of the sign with the crucifix in 1996. *Id.* at 574. The Sixth Circuit stated, in regards to plaintiffs' argument, "This argument implies that the sign posted for several days in 1996 irrevocably established an endorsement of religion, from which Defendants cannot retreat." *Id.* The Sixth Circuit rejected that argument, stating that it preferred Judge Posner's reasoning in the case of *Metzl*. *Granzeier* recognized that if Illinois could reinstate its law with a constitutional purpose, there was no reason why one past action that was arguably unconstitutional should forever taint future conduct to the point where the defendant could never act constitutionally. 173 F.3d at 574.

The Sixth Circuit held in *Adland v. Russ*, 307 F.3d 471 (6th Cir. 2002) that a Ten Commandments monument was

unconstitutional but explicitly held that the State of Kentucky could correct its unconstitutional purpose by modifying the display. The Court stated, "[W]e do not hold that the Commonwealth of Kentucky can never display the Ten Commandments or this monument in particular.... [W]e are nevertheless confident that... the Commonwealth can permissibly display the monument in question." *Id.* at 489-90.

Government must be allowed to correct its past unconstitutional actions and cannot be forever bound if it missteps in the Establishment Clause minefield. The Sixth Circuit's opinion conflicts with precedent from the Third and Seventh Circuits and the Sixth Circuit's own precedent. This Court should accept this case and resolve the conflicts.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 01-5935

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, ET AL.,

PLAINTIFFS-APPELLEES,

V.

MCCREARY COUNTY, KENTUCKY, ET AL.

DEFENDANTS-APPELLANTS.

Appeal from the United States District Court
for the Eastern District of Kentucky at London.
Nos. 99-00507; 99-00508; 99-00509—
Jennifer B. Coffman, District Judge.
Argued: December 4, 2002
Decided and Filed: December 18, 2003
Before: RYAN, CLAY, and GIBBONS, Circuit Judges.

COUNSEL

ARGUED: Mathew D. Staver, LIBERTY COUNSEL,

Longwood, Florida, for Appellants. David A. Friedman, AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, Louisville, Kentucky, for Appellees. ON BRIEF: Mathew D. Staver, Erik W. Stanley, LIBERTY COUNSEL, Longwood, Florida, Johnnie L. Turner, LAW OFFICES OF JOHNNIE L. TURNER, Harlan, Kentucky, for Appellants. David A. Friedman, AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, Louisville, Kentucky, for Appellees. David R. Huggins, NATIONAL LEGAL FOUNDATION, Virginia Beach, Virginia, for Amicus Curiae.

CLAY, J., delivered the opinion of the court. GIBBONS, J., delivered a separate concurring opinion. RYAN, J., delivered a separate dissenting opinion.

OPINION

CLAY, Circuit Judge. Defendants, two Kentucky counties and a county school district, as well as three officials of these governmental entities, appeal from the district court's order granting Plaintiffs' motion for a supplemental preliminary injunction prohibiting Defendants from displaying copies of the Ten Commandments in three separate displays on the basis that Plaintiffs showed a strong likelihood of succeeding on their claim that Defendants' displays violated the Establishment Clause of the First Amendment. For the reasons set forth below, we AFFIRM.

I.

BACKGROUND

A. Procedural History

On November 18, 1999, seven individuals in three Kentucky counties (McCreary County, Harlan County, and Pulaski County) along with the American Civil Liberties Union ("ACLU") filed three lawsuits in the United States District Court for the Eastern District of Kentucky, alleging that these counties had erected displays consisting of framed copies of the Ten Commandments in the county courthouses of McCreary and Pulaski Counties, as well as in the schools of the Harlan County School District, in violation of the Establishment Clause of the First Amendment.[4] Plaintiffs

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[4] The three lawsuits were considered as one by the district court, and are so considered on appeal. *See ACLU of Ky. v. McCreary County, Ky.*, 96 F. Supp. 2d 679, 682 n.2 (E.D. Ky. 2000) ("This is one of three companion cases, simultaneously filed, which attack such displays. Any minimal variances among the three displays possess no legal significance for the purpose of the motions now pending before the court. Having observed that the case records also share similar complaints, memoranda, and motions and that the three cases share identical lead counsel on both sides, the court combined the three for oral argument and today enters virtually identical opinions— with necessary but slight factual variations—in all three."). The three opinions of which the district court spoke are as follows: *ACLU of Ky. v. McCreary County, Ky.*, 96 F. Supp. 2d 679 (E.D. Ky. 2000) ("*McCreary I*"); *ACLU of Ky v. Pulaski County*, Ky., 96 F. Supp. 2d 691 (E.D. Ky. 2000); *Doe v. Harlan County Sch. Dist.*, 96 F. Supp. 2d 667 (E.D. Ky. 2000). The district court eventually

sought a declaration that the displays were unconstitutional, as well as preliminary and permanent injunctive relief enjoining the counties from continuing their display of the Ten Commandments.

Shortly after the complaint was filed, Defendants modified the displays to include secular historical and legal documents, some of which were excerpted, and then filed respective motions to dismiss. Following a hearing held on April 20, 2000, the district court issued an order on May 5, 2000 in each of the three cases which denied Defendants' motions to dismiss and granted Plaintiffs' motions for preliminary injunctive relief; the court ordered that the displays be removed and that no similar displays be erected. Defendants filed a notice of appeal to this Court, and a motion to stay the injunction pending appeal. The district court denied the motion to stay, as did this Court.

Defendants allegedly obtained new counsel and then filed a motion to clarify the district court's preliminary injunction as to all Defendants regarding the court's prohibition against erecting "similar displays." The district court denied the motion for clarification on September 15, 2000, stating that "the injunction speaks for itself." (J.A. at 119.)

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consolidated the three cases under case number 99-507. All Defendants filed a single notice of appeal from the district court's June 22, 2001, order granting Plaintiffs' motion for a supplemental preliminary injunction. *ACLU of Ky. v. McCreary County, Ky.*, 145 F. Supp. 2d 845 (E.D. Ky. 2001) ("*McCreary II*) (order granting Plaintiffs' motion for supplemental preliminary injunction).

Defendants, allegedly acting on the belief that a display containing the Ten Commandments could be erected within the parameters of the Constitution, voluntarily dismissed their appeal to this Court and erected new displays containing several additional secular historical and legal documents in their entirety, along with the Ten Commandments. The courthouse displays contained an explanation entitled the "Foundations of American Law and Government Display" which explained that the displays included various documents that played a significant role in the founding of the American system of law and government. The school district displays contained similar documents to the courthouse displays, except instead of the "Foundations of American Law and Government Display" explanation, the School Board displays contained a School Board Resolution. The Resolution addressed the historical context of the displays and opened a forum for the community to post an unlimited number of additional historical documents.

As a result of these new displays, Plaintiffs filed a motion to hold Defendants in contempt for violating the district court's preliminary injunction or, in the alternative, to enter a supplemental preliminary injunction order. Defendants responded to Plaintiffs' motion by arguing that the new displays were not similar to the previous displays, and contended that the "purpose for the display is to educate citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government." (J.A. at 151.)

A hearing was held on March 30, 2001, at which time the district court denied Plaintiffs' motion for contempt, and on April 2, 2001. the court entered a corresponding order

denying the motion for contempt, while urging the parties to settle the matter. The court noted in the order, however, that if the parties could not reach a settlement by April 30, 2001, the court would rule upon Plaintiffs' motion for a supplemental preliminary injunction. The parties failed to reach a settlement, and the district court then issued an order granting Plaintiffs' motion for a supplemental preliminary injunction on June 22, 2001. It is from the district court's order granting Plaintiffs' motion for a supplemental preliminary injunction that Defendants now appeal.

B. Facts

In 1999, McCreary County erected a display of the Ten Commandments in the McCreary County Courthouse consisting of "at least one framed copy of one version of the Ten Commandments and [which] was not part of any larger educational, historical, or retrospective exhibit." *McCreary I, supra* note 1, at 684. The display was erected pursuant to an order signed by Defendant Jimmie Greene, McCreary County Judge Executive. *Id.* Likewise, Pulaski County officials erected a copy of the Ten Commandments in the Pulaski County courthouse in the same fashion. *Pulaski, supra* note 1, at 695. The Pulaski display was erected by Defendant Darrell Beshears, Pulaski County Judge Executive. *Id.* The courthouse displays, both in their initial and later in their modified forms, were "readily visible to the plaintiffs and the other county citizens who use the courthouse to conduct civic business, to obtain or renew driver's licenses and permits, to register cars, to pay local taxes, and to register to vote." *McCreary I, supra* note 1, at 684; *Pulaski, supra* note 1, at 695. The schools in Harlan County School District displayed copies of a version of the Ten Commandments in their

classrooms which, like the courthouse displays, initially consisted of "framed copies of one version of the Ten Commandments which were not part of larger educational, historical or retrospective exhibits." *Harlan, supra* note 1, at 671.

After Plaintiffs filed suit, Defendants amended the respective displays "in an attempt to bring the display[s] within the parameters of the First Amendment and to insulate themselves from suit." *McCreary I, supra* note 1, at 684. Specifically, the Courthouse displays were modified to consist of:

> (1) an excerpt from the Declaration of Independence; (2) the Preamble to the Constitution of Kentucky; (3) the national motto of "In God We Trust"; (4) a page from the Congressional Record of Wednesday, February 2, 1983, Vol. 129, No. 8, declaring it the Year of the Bible and including a copy of the Ten Commandments; (5) a proclamation by President Abraham Lincoln designating April 30, 1863 a National Day of Prayer and Humiliation; (6) an excerpt from President Lincoln's "Reply to Loyal Colored People of Baltimore upon Presentation of a Bible" reading, "The Bible is the best gift God has ever given to man."; (7) a proclamation by President Ronald Reagan marking 1983 the Year of the Bible; and (8) the Mayflower Compact.

Id. (footnote omitted); *see also Pulaski, supra* note 1, at 695-96. The School Board display was modified to include those documents included in the modified courthouse displays, along with the addition of "a recently enacted

Kentucky statute, K.R.S. 158.195, which the defendants allege permits the posting of the Ten Commandments; and ...a Harlan County School Board resolution permitting the posting of the Ten Commandments." *Harlan, supra* note 1, at 672. Also common to all three modified displays was the fact that while some of the added documents were "displayed in their entirety, the defendants [] excerpted a small portion of others to include only that document's reference to God or the Bible with little or no surrounding text." *McCreary I, supra* note 1, at 684; *Pulaski, supra* note 1, at 696; *Harlan, supra* note 1, at 672.

Despite the modifications, Plaintiffs sought a preliminary injunction from the district court to enjoin Defendants from displaying the modified exhibits, and the district court granted the preliminary injunction as to all three displays. *See McCreary I, supra* note 1, at 691. The district court found that "the amended displays failed the 'purpose' and 'effect' prongs of the three-part test set out in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in that they lacked a secular purpose and had the effect of endorsing religion." *McCreary II, supra* note 1, at 846 (footnotes omitted). The court ordered that the displays be removed "immediately" and further ordered that "similar displays" could not be erected in the future. *McCreary I, supra* note 1, at 691.

Defendants then posted a third version of the displays, presuming that the modified displays were in conformity with the law as set forth in the district court's opinions. The new courthouse displays consisted of the entire Star Spangled Banner, the Declaration of Independence, the Mayflower Compact, the Bill of Rights, the Magna Carta, the National Motto, the Preamble to the Kentucky Constitution, the Ten

Commandments[5], Lady Justice and a one-page prefatory

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[5] This version of the Ten Commandments reads as follows:

Thou shalt have no other gods before me.

Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water underneath the earth: Thou shalt not bow down thyself to them, nor serve them: for I the LORD thy God am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me.

Thou shalt not take the name of the LORD thy God in vain: for the LORD will not hold him guiltless that taketh his name in vain.

Remember the sabbath day, to keep it holy.

Honour thy father and mother: that thy days may be long upon the land which the LORD thy God giveth thee.

Thou shalt not kill.

Thou shalt not commit adultery.

Thou shalt not steal.

Thou shalt not bear false witness against thy neigbour.

Thou shalt not covet thy neighbour's house, thou

document entitled "The Foundations of American Law and Government Display." (J.A. 161-74.) The prefatory description states that the "display contains documents that played a significant role in the foundation of our system of law and government." (J.A. at 161.) With regard to the Ten Commandments, the prefatory description states:

> The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence, which declared that, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.

Id. There is no other discussion of the Ten Commandments and how it purportedly relates to any of the other documents

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> shalt not covet thy neighbour's wife, nor his manservant, nor his maidservant, nor his ox, nor his ass, nor any thing that is thy neighbour's.
>
> Exodus 20: 3-17
>
> King James Version

(J.A. 169.)

in the display.

The new School Board displays consisted of the entire Star Spangled Banner, the Declaration of Independence, the Mayflower Compact, the Bill of Rights, the Magna Carta, the National Motto, the Preamble to the Kentucky Constitution, an excerpt of the Congressional Record containing the Ten Commandments,[6] Kentucky Statute § 158.195 regarding the

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[6] The Ten Commandments are included in a statement of Representative Philip M. Crane of Illinois in which he discusses a Joint Resolution authorizing then-President Reagan to declare 1983 to be the "Year of the Bible." *See* (J.A. 208.) (statement of Rep. Crane; quoting H.J. Res. 487, 98th Cong. (1983)). Representative Crane's version of the Ten Commandments reads:

> 1. I am the Lord thy God, thou shalt have no other gods before me.
>
> 2. Thou shalt not make unto thee any graven image.
>
> 3. Thou shalt not take the name of the Lord thy God in vain.
>
> 4. Remember the Sabbath day to keep it holy.
>
> 5. Honor thy father and mother.
>
> 6. Thou shalt not kill.
>
> 7. Thou shalt not commit adultery.
>
> 8. Thou shalt not steal.

posting of historical displays and a School Board Resolution ("the Resolution"). (J.A. at 198-208.) The Resolution stated, in part:

> We believe these ... documents positively contribute to the educational foundations and moral character of students in our schools. ... [I]t is our opinion that these ... documents, taken as a whole, are valuable examples of documents that may instill qualities desirable of the students in our schools, and have had particular historical significance in the development of this country.

(J.A. at 198.) The Resolution also contained a procedure that would permit any person to request the posting of other historical documents with the permission of the Harlan County Board of Education. (J.A. at 198-99.)

The district court, after recognizing the Supreme Court's approval of "two constitutionally permissible uses of the Ten Commandments within the public arena," found that the new displays were "clearly outside the bounds of these permissible uses and [were] violative of the Establishment Clause." *McCreary II, supra* note 1, at 852-53 (citing *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) and *Stone v. Graham*, 449 U.S. 39 (1980)). The district court thus enjoined

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9. Thou shalt not bear false witness.

10. Thou shalt not covet.

Id.

Defendants from continuing with the new displays and ordered all three to be removed immediately from their respective locations. *McCreary II, supra* note 1, at 853.

II.

DISCUSSION

A. Standard of Review

A preliminary injunction is an extraordinary measure that has been characterized as "one of the most drastic tools in the arsenal of judicial remedies." *Hanson Trust PLC v. ML SCM Acquisition Inc.*, 781 F.2d 264, 273 (2d Cir. 1986) (citation omitted); *see also Detroit Newspaper Publishers. Ass'n v. Detroit Typographical Union No. 18*, 471 F.2d 872, 876 (6th Cir. 1972) (emphasizing that a preliminary injunction is the strong arm of equity which should not be extended to cases which are doubtful or do not come within well-established principles of law). This Court reviews the district court's decision to grant a preliminary injunction for an abuse of discretion while giving great deference to the district court's determination; however, this Court's deference to the district court is not absolute. *Mascio v. Pub. Employees Ret. Sys.*, 160 F.3d 310, 312-13 (6th Cir. 1998). The injunction will be disturbed if the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard. *See Blue Cross & Blue Shield Mut. v. Blue Cross & Blue Shield Ass'n*, 110 F.3d 318, 322 (6th Cir. 1997). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed." *See United States v. United States Gypsum*,

Co., 333 U.S. 364, 395 (1948).

B. Analysis

In the exercise of its discretion with respect to a motion for preliminary injunction,

> a district court must give consideration to four factors: "(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction." *Rock & Roll Hall of Fame & Museum, Inc. v. Gentile Prods.*, 134 F.3d 749, 753 (6th Cir. 1998).

Mascio , 160 F.3d at 312-13. Federal Rule of Civil Procedure 52(c) "requires a district court to make specific findings concerning each of these four factors, unless fewer are dispositive of the issue." *See In re DeLorean Co.*, 755 F.2d 1223, 1228 (6th Cir. 1985).

In *Elrod v. Burns*, 427 U.S. 347, 373 (1976), the Supreme Court held that when reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated. In other words, the first factor of the four-factor preliminary injunction inquiry—whether the plaintiff shows a substantial likelihood of succeeding on the merits—should be addressed first insofar as a successful showing on the first factor mandates a successful showing on the second

factor—whether the plaintiff will suffer irreparable harm. *See id.*; *see also Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir. 1998) (finding that "[w]hen a party seeks a preliminary injunction on the basis of the potential violation of the First Amendment, the likelihood of success on the merits often will be the determinative factor").

1. Strong Likelihood of Success on the Merits

The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion." U.S. Const., amend. I. This clause is made applicable to the states through the Fourteenth Amendment. *See Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947). As the Supreme Court has recognized, "[t]he Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious beliefs or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" *County of Allegheny v. Am. Civil Liberties Union*, 492 U.S. 573, 593-94 (1989) (quoting *Lynch v. Donnelly*, 465 U.S. 668 (1984)).

While sitting en banc, this Court recently observed that although individual Supreme Court justices have expressed reservations regarding the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) for determining whether a particular government action violates the Establishment Clause, *see Am. Civil Liberties Union of Ohio v. Capital Square Review & Advisory Bd.*, 243 F.3d 289, 306 & n.15 (6th Cir. 2001) (en banc) (collecting cases), this Court, as an intermediate federal court, is bound to follow the *Lemon* test until the Supreme Court explicitly overrules or abandons it. *Adland v. Russ*, 307

F.3d 471, 479 (6th Cir. 2002) (citing *Grutter v. Bollinger*, 288 F.3d 732, 743 (6th Cir. 2002)).

The *Lemon* test, as originally formulated, required reviewing courts to consider whether (1) the government activity in question has a secular purpose; (2) whether the activity's primary effect advances or inhibits religion; and (3) whether the government activity fosters an excessive entanglement with religion. *Lemon*, 403 U.S. at 612-13. Although this remains the original formulation of the *Lemon* test, this Court has recognized in recent years that the Supreme Court has applied what is known as the "endorsement" test, which looks to whether a reasonable observer would believe that a particular action constitutes an endorsement of religion by the government. *See Adland*, 307 F.3d at 479 (citing *Granzeier v. Middleton*, 173 F.3d 568, 573 (6th Cir. 1999) (collecting cases) and *Hawley v. City of Cleveland*, 24 F.3d 814, 822 (6th Cir. 1994)). Accordingly, this Court has held that the endorsement test "should be treated 'as a refinement of the second *Lemon* prong.'" *Baker v. Adams County/Ohio Valley Sch. Bd.*, 310 F.3d 927, 929 (6th Cir. 2002) (quoting *Adland*, 307 F.3d at 479). If a plaintiff establishes a violation of any prong of the *Lemon* test, then the government action is unconstitutional. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).

a. "Purpose" Prong of the Lemon Test

Although a government's stated purposes for a challenged action are to be given some deference, it remains the task of the reviewing court to "distinguis[h] a sham secular purpose from a sincere one." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000). Specifically, it is up to this Court to

determine whether Defendants' inclusion of the Ten Commandments in the displays was a "purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message." *Lynch*, 465 U.S. at 680. To satisfy this prong of the *Lemon* test, Plaintiffs must show that Defendants' predominate purpose for the displays was religious. *See Adland*, 307 F.3d at 480 ("Although a totally secular purpose is not required, it is clear that the secular purpose requirement is not satisfied . . . by the mere existence of some secular purpose, however dominated by religious purposes.") (internal quotation marks and citations omitted). *See also Stone*, 449 U.S. at 41 (examining "pre-eminent purpose for posting the Ten Commandments on schoolroom walls"); *Aguillard*, 482 U.S. at 599 (Powell , J., concurring) ("A religious purpose alone is not enough to invalidate an act of a state legislature. The religious purpose must predominate.") (citations omitted).

As noted by the district court below, Defendants herein articulated the following purposes for the latest versions of the displays:

> (1) to erect a display containing the Ten Commandments that is constitutional;
>
> (2) to demonstrate that the Ten Commandments were part of the foundation of American Law and Government;
>
> (3) [to include the Ten Commandments] as part of the display for their significance in providing "the moral background of the Declaration of Independence and the foundation of our legal tradition;"

> (4) to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government; and
>
> (5) [as stated by the Harlan County School Board] to create a limited public forum on designated walls within the school district for the purpose of posting historical documents which played a significant role in the development, origins or foundations of American or Kentucky law. . . .

McCreary II, supra note 1, at 848 (citations to record and footnotes omitted). The district court found that the first three purposes were, "on their face, religious in nature and therefore impermissible," and that "the history of the display belies the secular intentions of the other two." *Id.* at 848-49. We agree with the district court's ultimate conclusion that the predominate purpose of the displays was religious. We do take issue, however, with some of the district court's reasoning underpinning that conclusion.

The district court reasoned that the first three articulated purposes were "facially" unconstitutional under the Supreme Court's holding in *Stone v. Graham*, inasmuch as "that case established that a state's desire to proclaim the Ten Commandments' foundational value for American law and government is a religious, rather than secular, purpose." *McCreary II, supra* note 1, at 849. The court went on to note that in *Stone*, the Commonwealth of Kentucky sought to post the Ten Commandments along with the following notation: "'The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of

Western Civilization and the Common Law of the United States.'" *Id.* (quoting *Stone*, 449 U.S. at 41). The court opined that this "putatively secular purpose" in Stone was rejected by the Supreme Court, and "is fundamentally the same as the defendants' first three articulated purposes" in the matter at hand. *Id.*

This Court disagrees. On its face, the first articulated purpose – to erect a constitutional display of the Ten Commandments – has nothing to do with the state's desire to proclaim the Ten Commandments' foundational contribution to American law and government. Rather, the facial purpose is simply to comport governmental conduct (i.e., the displays) with the law. Nevertheless, the first statement of purpose does not satisfy Defendants' burden of articulating a secular purpose for the displays, because this statement merely begs the ultimate legal question of whether Defendants' conduct is constitutional. This avowed purpose fails to shed any light on Defendants' motivation for creating the displays; at most, this purpose explains certain alterations Defendants made to the displays, but not the *raison d'etre* of the displays.[7] Accordingly, the first stated purpose does not constitute a secular purpose as a matter of law. *See Adland*, 307 F.3d at 482 (finding that government had failed to articulate a secular explanation for Ten Commandments display where "its asserted secular justification is intended merely to avoid Establishment Clause liability rather than to actually further a legitimate secular purpose"); *Books v. City of Elkhart, Ind.*,

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[7] The first stated purpose might not be question-begging if Defendants had created the displays in the context of a legal discussion in order to illustrate the constitutional limits of religious expression by governmental entities. This is clearly not the case.

235 F.3d 292, 304 (7th Cir. 2000) ("... [W]e shall not accept a stated purpose that merely seeks to avoid a potential Establishment Clause violation.")

This Court also disagrees with the district court's pronouncement about the second and third stated purposes, based on the Supreme Court's decision in *Stone*, that "a state's desire to proclaim the Ten Commandments' foundational value for American law and government is a religious, rather than secular, purpose." *McCreary II, supra* note 1, at 849. In *Stone*, a state statute required the posting of the Ten Commandments on the wall of each public school classroom. Underneath the last Commandment appeared the following disclaimer: "The secular application of the Ten Commandments is clearly seen in its adoption of the fundamental legal code of Western Civilization and the Common Law of the United States." *Id.* at 40 n.1. The Court held that the "pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature" because the Commandments "are undeniably a sacred text in the Jewish and Christian faiths." *Id.* at 41. The Court rejected the "supposed" secular purpose of teaching the foundational role the Ten Commandments played in our civilization and legal system because merely posting the Ten Commandments fulfilled no "educational function." *Id.* at 42. The Court further opined that the outcome of the case may have been different had the Ten Commandments been "integrated into the school curriculum ... in an appropriate study of history, civilization, ethics, comparative religion, or the like." *Id.* (citation omitted).

Stone established no per se rule that displaying the Ten Commandments in an educational setting is unconstitutional.

See also Aguillard, 482 U.S. at 607-08 (Powell, J., concurring) ("[I]t is worth noting that the Establishment Clause does not prohibit per se the educational use of religious documents in public school education."); *Lynch*, 465 U.S. at 678-79 ("... [A]n absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court. ... In each case, the inquiry calls for line drawing; no fixed, per se rule can be framed."). Moreover, contrary to the district court's conclusion, *Stone* announced no per se prohibition against displaying the Ten Commandments for the purpose of demonstrating a connection with the structure of American law or government. In fact, several courts have indicated that a display for such a purpose may be permissible. *See Aguillard*, 482 U.S. at 593-94 ("[T]he Court acknowledged in *Stone* that its decision forbidding the posting of the Ten Commandments did not mean that no use could ever be made of the Ten Commandments, or that the Ten Commandments played an exclusively religious role in the history of Western Civilization.") (citing *Stone*, 449 U.S. at 42); *Books*, 235 F.3d at 302 ("The text of the Ten Commandments no doubt has played a role in the secular development of our society and can no doubt be presented by the government as playing such a role in our civic order.") Similarly, it is conceivable that the Ten Commandments could be incorporated into a comparative religion course or a study of "the nature of the Founding Father's religious beliefs and how these beliefs affected the attitudes of the times and the structure of our government." *Aguillard*, 482 U.S. at 606-07 (Powell, J., concurring) (discussing the Bible generally).

To comply with *Stone*, however, a purported historical display must present the Ten Commandments objectively and

integrate them with a secular message. When such a display consists almost entirely of reading material posted in a public school, the most logical way of achieving this goal is by integrating the Ten Commandments with a secular curriculum, such as through the objective study of history, ethics or comparative religion. *See Stone*, 449 U.S. at 42; *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963) ("... [S]tudy of the Bible or of religion, when presented objectively as part of a secular program of education, may ... be effected consistently with the First Amendment."). Several factors are relevant when assessing whether the Ten Commandments have been presented objectively and integrated with a secular message: the content of the displays, the physical setting in which the Ten Commandments are displayed and any changes that Defendants have made to the displays since their inception. *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 315 (holding that school's original policy on student-led prayer, which "unquestionably violated the Establishment Clause," was relevant to determining constitutionality of modified policy because the Court's inquiry "not only can, but must, include an examination of the circumstances surrounding its enactment"); *Adland*, 307 F.3d at 481 (in assessing state's avowed secular purpose in displaying Ten Commandments monument, Court looked to linguistic content of the statute authorizing the display and the intended physical context of the display).

The animating principle of *Stone* applies equally in a courthouse setting: the government must present the Ten Commandments objectively and must integrate them with a secular message. The government achieves this goal by ensuring that the symbols, pictures and/or words in the display share a common secular theme or subject matter. *See*

Adland, 307 F.3d at 481 (applying *Stone* to display of Ten Commandments on State's capitol grounds; expressing approval of the frieze on the wall of the Supreme Court, which depicts Moses carrying the Ten Commandments alongside Confucius, Mohammed, Caesar Augustus, William Blackstone, Napoleon Bonaparte and John Marshall because it does not convey the message that the Ten Commandments are the only precedent legal code of the State) (citing *Allegheny*, 492 U.S. at 652-53 (Stevens, J., concurring in part and dissenting in part) (noting that Supreme Court's friezes convey a message of "respect not for great proselytizers but for great lawgivers")). Accordingly, a court examines the same factors (content, context and the evolution of the displays) to assess the nature of the governmental purpose, regardless of whether the display is in a school building or a courthouse.

The district court failed to apply these legal standards to Defendants' second and third articulated purposes, dismissing them without sufficient analysis. Nevertheless, as discussed below, the undisputed evidence in the record concerning the content and context of the displays, as well as the evolution of the displays, demonstrates that the district court did not clearly err in finding that Defendants' actual purposes were religious. Further, although the district court's legal analysis of Defendants' fourth and fifth articulated purposes was more substantive, it, too, was incomplete. Again, however, any flaws in the district court's reasoning were not outcome-determinative because the displays' content, particularly when viewed in light of Defendants' past attempts to display the Ten Commandments in a blatantly religious manner, showed that Defendants' predominate purpose for the displays was religious.

i. Content of the displays

a) School displays

The School Board's display of, *inter alia*, the Star Spangled Banner, the Declaration of Independence, the Mayflower Compact, the Bill of Rights, the Magna Carta, the National Motto and the Preamble to the Kentucky Constitution was accompanied by a School Board Resolution ("the Resolution"), the only document that purported to explain the significance of the documents. The Resolution stated, in part:

> We believe these ... documents positively contribute to the educational foundations and moral character of students in our schools. ... [I]t is our opinion that these ... documents, taken as a whole, are valuable examples of documents that may instill qualities desirable of the students in our schools, and have had particular historical significance in the development of this country.

The Resolution provided the sole source of commentary about the documents in the display.

Even a generous reading of the Resolution reveals that the Ten Commandments are not integrated with a secular study of American law or government. The Resolution merely asserts, without further elaboration, the School Board's "belie[f]" and "opinion" that the documents, including the Ten Commandments, have educational and moral value, as well as historical significance. It is difficult to determine what subject, if any, the display even purports to study.

Moreover, the Resolution in no way connects the Ten Commandments with the other historical documents. The likely explanation for this phenomenon is that the "Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths," *Stone*, 449 U.S. at 41, and the other historical documents are not. As the Supreme Court has observed, "the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day." *Id.* at 42 (citing Exodus 20: 1-11; Deuteronomy 5: 6-15). None of the other historical documents concern the religious duties of those who believe in God. Nor do these documents discuss the Ten Commandments' requirement to honor parents or the prohibitions against killing, committing adultery, stealing, bearing false witness and coveting.

The Ten Commandments themselves are contained in an excerpt from the Congressional Record, which reprints a Joint Resolution of Congress declaring 1983 to be "Year of the Bible." (J.A. 208.) The fact that the Ten Commandments appear in a historical governmental publication, such as the Congressional Record, however, does not "secularize" the Ten Commandments. Rather, the question is whether the language of the Congressional Record excerpt integrates the Ten Commandments with an objective discussion of a secular subject matter. It clearly does not. The excerpt, like the School Board's Resolution, asserts an opinion (that of a Representative) that "it would serve an educational purpose for our citizens to become familiar with the important role which the Bible and Ten Commandments have played in molding our American traditions and laws." (J.A. 208.) The excerpt, however, never explains the connection between the

Ten Commandments and American traditions. The Joint Resolution itself makes assertions about the role of the Bible in forming the United States and inspiring the Declaration of Independence and the Constitution of the United States. It then concludes with the following statements:

> Whereas the history of our Nation clearly illustrates the value of voluntarily applying the teachings of the Scriptures in the lives of individuals, families, and societies;
>
> ...
>
> Whereas that renewing our knowledge of and faith in God through Holy Scriptures can strengthen us as a Nation and a people; Now, therefore, be it
>
> Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President is authorized and requested to designate 1983 as a national "Year of the Bible" in recognition of both the formative influehce the Bible has been for our nation, and our national need to study and apply the teaching of the Holy Scriptures."

(J.A. 208.) In short, Defendants' public school displays of the Ten Commandments are contained within a text that exhorts Americans to acknowledge the Bible as "the Word of God" and to apply the teachings of the Bible to their lives. The message is patently religious and in no way resembles an objective study of the role that the Ten Commandments, or even the Bible generally, played in the foundation of the

American government.

b) Courthouse displays

The courthouse displays of the Star Spangled Banner, the Declaration of Independence, the Mayflower Compact, the Bill of Rights, the Magna Carta, the National Motto, the Preamble to the Kentucky Constitution, the Ten Commandments and Lady Justice were preceded by a one-page prefatory description of the documents entitled "The Foundations of American Law and Government Display." The prefatory description of the Ten Commandments is limited to the following:

> The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence, which declared that, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.

Although a bit different in form from the school displays, the courthouse displays of the Ten Commandments suffer from the same fundamental flaw – the lack of a demonstrated analytical or historical connection with the other documents.

As noted, the prefatory document asserts a connection between the Ten Commandments and "the formation of our

country" and "our legal tradition." To support this thesis, the preface cites to the "clear[]" influence that the Ten Commandments had on the Declaration of Independence. It is not facially apparent, and the preface offers no explanation, how the quotation from the Declaration is in any way connected with the Ten Commandments, which say nothing about men being created equal and with the rights to life, liberty and the pursuit of happiness. The only facial similarity between the two documents is that they both recognize the existence of a deity. The concept of a deity, however, is by no means unique to the Ten Commandments or even the Judeo-Christian tradition. Thus, this solitary similarity hardly demonstrates how the Ten Commandments in particular influenced the writing of the Declaration and, hence, the foundation of our country and legal tradition.

To buttress this alleged connection, Defendants have proffered evidence that each of the Ten Commandments was codified, to one extent or another, into the legal codes of some American Colonies, and that some of the Commandments (such as prohibitions against stealing, perjury and killing) persist to this day in American legal codes. Specifically, Defendants cite to a 1610 Virginia law requiring its leaders to give "allegiance" to God; a 1680 New Hampshire law barring idolatry; a 1610 Virginia law and a 1639 Connecticut law against taking God's name in vain; laws from the 1600's and 1700's recognizing the Sabbath; a 1642 Connecticut law exhorting children to honor their parents; laws prohibiting killing; laws from the 1600's and 1700's prohibiting adultery; laws against stealing; and anti-perjury laws that prohibit bearing "false witness." Defendants cite to no particular law that prohibits "coveting."

The problem with this evidence and Defendants' accompanying argument is two-fold. One, the evidence does not appear in the actual display of the Ten Commandments, so an observer would not actually be made aware of these facts – a phenomenon equally relevant to the discussion of the "endorsement" issue below. Two, even assuming that the Ten Commandments are the sole or primary source of some laws codified by certain Colonies and State legislatures, this "fact" is irrelevant to the fundamental assertion in the display that the Ten Commandments clearly influenced the creation of the Declaration of the Independence and, thus, the formation of our country and legal tradition. The dissent expends a considerable amount of effort discussing "the influence of religion upon American law." We have no reason to doubt the existence of such an influence, but that is not the issue in this case. Even granting that religion in general influenced the development of our country and our legal traditions, we cannot simply take judicial notice of the very different and very specific claim that the Ten Commandments profoundly influenced the drafting of the Declaration of Independence. An assertion of such a connection is not evidence of such a connection. Thus, the dissent's discussion, like Defendants' evidence, simply misses the mark.

The Court finds it significant that neither Defendants nor the dissent have attempted to buttress the historical claim that the prefatory document makes about the Ten Commandments' foundational role in the drafting of the Declaration of Independence. To be sure, "[t]he fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself." *Abington Sch. Dist.*, 374

U.S. at 213. There is by no means a consensus, however, that the source of Thomas Jefferson's belief in divinely-bestowed, unalienable rights, to the extent this belief inspired the writing of the Declaration,[8] was the Ten Commandments or even the Bible. One historian has noted that Jefferson believed in the "watchmaker God of deism ... who established the laws of nature in the material universe at the time of creation and then left it alone." Allen Jayne, *Jefferson's Declaration of Independence: Origins, Philosophy and Theology* 24 (1998). He therefore posits that the "Nature's God" Jefferson referenced in the Declaration was not the God of the Bible (and thus the Ten Commandments), but the God of deism.[9]

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[8] The Continental Congress appointed a committee of five to decide who would write the Declaration. Pauline Maier, *American Scripture* 99 (1998). The committee assigned Jefferson the task of drafting the document. *Id.* at 100. The draft was revised based on comments from Benjamin Franklin and John Adams. *Id.* at 100-02. After incorporating their comments, Jefferson reported the revised draft to the Congress. *Id.* at 100. Once in Congress, the Declaration was revised by other men. *Id.* at 105.

[9] *Id.* at 19 ("Jefferson's heterodox religious views were founded on an Enlightenment outlook in general and the writings of Henry St. John, Lord Viscount Bolingbroke, in particular. It is the God of his heterodoxy that appears in the Declaration of Independence rather than the God of the Bible."); *id.* at 38 ("Jefferson's God of the Declaration is ... antithetical to any God who would manifest partiality by choosing one people or nation over others, as did the God of the Old Testament."). Jayne also quotes a letter written by Jefferson in which he expressed doubt about the origin and authenticity of the Ten Commandments. *Id.* at 34 ("'[T]he whole history of these books [containing the Ten Commandments] is so defective and doubtful, that it seems vain to

Further, several historians have concluded that Jefferson was most inspired by contemporaneous political writings as well as the musings of European philosophers and writers.[10]

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attempt minute inquiry into it; and such tricks have been played with their text, and with the other texts of other books relating to them, that we have a right from that cause to entertain much doubt what parts of them are genuine.'") (quoting January 24, 1824, letter from Jefferson to John Adams).

[10] *See* David McCullough, *John Adams* 121 (2001) (noting that Jefferson borrowed from his previous writings, as well as the writings of George Mason and Pennsylvania delegate James Wilson; further noting that Jefferson was "drawing on long familiarity with the seminal works of the English and Scottish writers John Locke, David Hume, Francis Hutcheson, and Henry St. John Bolingbroke, or such English poets as Defoe"); Maier, *supra* note 5, at 104 (noting evidence that Jefferson hastily produced a draft of the Declaration in a day or two and adapted two texts to complete a draft in this short time-frame: the preamble to the Virginia Constitution, "which was itself based on the English Declaration of Rights," and a preliminary version of the Virginia Declaration of Rights that had been drafted by George Mason); *id.* at 136 (noting that the Declaration's reference to "the laws of nature and nature's god" parallels the laws applicable to "individuals in a state of nature, a point, incidentally, that John Locke made explicitly in his Second Treatise of Government"); Carl Becker, *The Declaration of Independence: A Study in the History of Ideas* 79 (1922) (noting that with respect to "the political philosophy of Nature and natural rights" referenced in the Declaration that the "lineage is direct: Jefferson copied Locke"); Jayne, *supra*, at 44 (noting "the similarity of many of the provisions of [Locke's] Second Treatise with those of the Declaration, which clearly shows that Jefferson not only had

Defendants have not cited the Court to a single historical source in support of the proposition that the Ten Commandments inspired the drafting of the Declaration of Independence.

Although this Court has neither the ability nor the authority to determine the "correct" view of American history, it is our role to recognize that (a) Defendants' displays provided the viewer with no analytical or historical connection between the Ten Commandments and the other historical documents; and (b) Defendants have made no attempt in this litigation to support the displays' historical assertions with relevant and credible evidence. The Court's reference to historical sources is intended merely to illuminate these fundamental deficiencies in Defendants' argument and to suggest that an objective presentation of the Ten Commandments would at least take into account the abundant historical evidence regarding the sources that influenced the drafters of the Declaration of Independence.[11] Contrary to the dissent's assertion, we do not "envision a display that contains a recounting of the history of the nation's founding [or] a summary of American constitutional law and history." We do envision, however, a display that does not go out of its way to stress the proposition that the Ten Commandments formed the foundation of the Declaration of Independence while utterly ignoring (and implicitly denying) all other influences. It is up to Defendants to determine the most

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extensive knowledge of Locke's work but put it to use in drafting the Declaration").

[11] *See, e.g.*, note 7, *supra*.

efficient manner of integrating the Ten Commandments with an objective historical display.

c) Summary

In sum, the very text in which the Ten Commandments are contained in the schoolhouse displays manifests a patently religious purpose. Defendants' courthouse displays also manifest a religious purpose because they utterly fail to integrate the Ten Commandments with a secular subject matter. When distilled to their essence, the courthouse displays demonstrate that Defendants intend to convey the bald assertion that the Ten Commandments formed the foundation of American legal tradition. The Supreme Court has held, however, that "such an 'avowed' secular purpose is not sufficient to avoid conflict with the First Amendment" when no effort has been made to integrate the Ten Commandments with a discussion or display of a secular subject matter. *Stone*, 449 U.S. at 41. Since Defendants' displays make no such effort, the district court correctly concluded that Defendants' primary purpose was religious.

This Court's decision in *Adland*, which was rendered after the district court's decision, further supports its conclusion. In *Adland*, a Kentucky law directed the Department for Facilities Management to "relocate the monument inscribed with the Ten Commandments which was displayed on the Capital grounds for nearly three decades to a permanent site on the Capital grounds near Kentucky's floral clock to be made part of a historical and cultural display including the display of [the law] to remind Kentuckians of the Biblical foundations of the laws of the Commonwealth." *Id.* at 474-75. In finding that the stated purpose of the law, "to remind Kentuckians of

the Biblical foundations of the laws of the Commonwealth," failed the secular purpose prong of the *Lemon* test, this Court concluded that "this avowed secular purpose, which is essentially the same secular purpose that the Commonwealth of Kentucky put forth in *Stone*, is insufficient, standing alone, to satisfy the secular purpose requirement." *Id.* at 481 (citing *Stone*, 449 U.S. at 42). The Court further opined:

> While the Commonwealth need not commemorate every arguable historical influence on the laws of the Commonwealth or keep current with the views of every scholar to ensure compliance with the Establishment Clause, we cannot ignore its decision to focus only on the "Biblical foundations" of the law. ... [I]n addressing the Commonwealth's avowed secular purpose for displaying an overtly religious symbol such as the Ten Commandments, we cannot ignore the Commonwealth's adoption of a view that emphasizes a single religious influence to the exclusion of all other religious and secular influences.

Id. at 481-82 (citation omitted).

Like the display in *Adland*, Defendants' courthouse displays assert that the Ten Commandments provide "*the* moral background of the Declaration of Independence and *the* foundation of our legal tradition." (J.A. 161) (emphases added). The displays emphasize a single religious influence, with no mention of any other religious or secular influences. This fact confirms the rectitude of the district court's conclusion that Defendants' purposes were religious.

ii. Context of the displays

The "intended physical context" of the Ten Commandment displays also is relevant to a determination of the primary purpose behind them. *Adland*, 307 F.3d at 481. Here, the displays did not provide undue physical emphasis to the Ten Commandments. In both the school and courthouse displays, the Ten Commandments appeared on a single piece of paper, the same size as that containing the secular documents. With that said, sandwiching the Ten Commandments between secular texts does not necessitate a finding that the primary purpose of the displays is secular. *See Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766, 771 (7th Cir. 2001) ("[T]he display of secular texts along with the Ten Commandments does not automatically lead to a finding that the purpose in erecting the monument is primarily secular."). Thus, where the content of the displays otherwise indicates a predominate religious purpose, the fact that the Ten Commandments are not physically prominent is not dispositive.

A finding of religious purpose is militated by the blatantly religious content of the displays. The displays do not present a "passive symbol" of religion like a crèche, which, when accompanied by secular reminders of the holiday season, has come to be associated more with the public celebration of Christmas, rather than that holiday's religious origins. *Lynch*, 465 U.S. at 686. Instead, the Ten Commandments are an active symbol of religion because they "concern[] the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day." *Stone*, 449 U.S. at 42 (Biblical citations omitted). The Ten Commandments "are undeniably

a sacred text in the Jewish and Christian faiths," *id.* at 41, and, therefore, are "still an inherently religious text." *Indiana Civil Liberties Union*, 259 F.3d at 771. As such, Defendants had to exercise special care to present the Ten Commandments objectively and as an integral part of a non-religious message. As discussed above, Defendants failed in this endeavor.

iii. Evolution of the displays

Defendants' conduct from the time it created the Ten Commandments displays throughout the time it modified the displays is relevant to determining their primary purpose. The Supreme Court made this legal principle abundantly clear in *Santa Fe Indep. Sch., supra.* That case involved a challenge to a policy of student-led prayer at high school football games. Prior to 1995, the school district's policy authorized a student elected as "Student Chaplain" to deliver a prayer over the public address system before each game. After several students and their parents filed suit challenging the policy under the Establishment Clause, the school district adopted a different policy in August 1995. The policy, entitled "Prayer at Football Games," authorized two student elections, the first to determine whether "invocations" and "benedictions" should be delivered at games, and the second to select the spokesperson to deliver them. *Santa Fe Indep. Sch.*, 530 U.S. at 297. The policy omitted any requirement that invocations and benedictions be nonsectarian and nonproselytising, but contained a fallback provision that automatically added the provision if the preferred policy should be enjoined. *Id.* The policy was changed again in October 1995 to omit the word "prayers" from the title, and to refer to "messages" and "statements" as well as "invocations." *Id.* at 298.

In holding that the school district had run afoul of the Establishment Clause by sponsoring a religious message, the Court looked, among other things, to "the evolution of the current policy from the long-sanctioned office of 'Student Chaplain' to the candidly titled 'Prayer at Football Games' regulation." *Id.* at 309. The Court held that "[t]his history indicates that the District intended to preserve the practice of prayer before football games." *Id.* Later in its decision, the Court held that the school district's history of noncompliance with the Establishment Clause not only could be considered, but had to be considered, in determining whether the school district's latest iteration of the challenged policy was constitutional. As the Court stated:

> This case comes to us as the latest step in developing litigation brought as a challenge to institutional practices that unquestionably violated the Establishment Clause. One of those practices was the District's long-established tradition of sanctioning student-led prayer at varsity football games. The narrow question before us is whether implementation of the October policy insulates the continuation of such prayers from constitutional scrutiny. It does not. Our inquiry into this question not only can, but must, include an examination of the circumstances surrounding its enactment. . . . Our discussion in the previous sections . . . demonstrates that in this case the District's direct involvement with school prayer exceeds constitutional limits.
>
> The District, nevertheless, asks us to pretend that we do not recognize what every Santa Fe High School student understands clearly—that this policy is about prayer. The District further asks us to accept what is

> obviously untrue: that these messages are necessary to "solemnize" a football game and that this single-student, year-long position is essential to the protection of student speech. We refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer.

Id. at 315.

This Court similarly has held that a government's earlier policies or practices involving religious speech are relevant when determining the primary purpose behind a revised policy that ostensibly is designed to address earlier violations of the Establishment Clause. In *Adland*, this Court was faced with a Kentucky statute that compelled the location of a monument inscribed with the Ten Commandments on the grounds of the state capitol, near a floral clock. *Adland*, 307 F.3d at 474-75. The statute was silent with regard to any other contents of the display. In the course of litigation, Kentucky "clarifie[d]" that the display would consist of other "markers, signs and monuments," including a sign commemorating a Civil War event, a "Welcome to Kentucky" plaque, a prisoner of war marker and markers for other civic leaders. *Id.* at 477. The Court found Kentucky's litigation-inspired "clarification" to its Ten Commandments display, which originally consisted only of the Ten Commandments monument and a clock, to be probative of the Commonwealth's religious purpose:

> [T]he Commonwealth did not reveal the contents of this display until it was in the midst of litigation. In our view, this indicates that the other components of

> the display are an afterthought, at best, secondary in importance to the Ten Commandments, and suggests that the Commonwealth acted with a predominantly religious purpose.

Id. at 481.

Contrary to Defendants' argument, this Court's decision in *Granzeier*, *supra*, does not deem Defendants' past unconstitutional displays of the Ten Commandments irrelevant to the primary purpose behind the latest version of the displays. The issue in *Granzeier* was whether the closing of county and state courts and offices on Good Friday violated the Establishment Clause. At one point, an employee of one of the county defendants, "acting without knowledge or authorization of any defendant, made signs bearing an image of the Crucifixion and announcing that the building would be closed 'for observance of Good Friday.'" *Granzeier*, 173 F.3d at 571. When the county was sued, it removed the signs from the courthouse and put up new signs announcing that the building would be closed; at the time of the litigation, the defendants referred to the Friday before Easter as "Spring Holiday." *Id.* The plaintiffs argued that the original sign showed that the defendants intention to close for a Spring holiday on the Friday before Easter was a "sham." *Id.* at 574.

This Court rejected the plaintiffs' argument because it saw "no reason that Defendants' policy here, if otherwise constitutional, should not remain so after an unauthorized employee posted an unconstitutional sign for a few days." *Id.* (emphasis added). The sign did not permanently taint all future closings for a Spring holiday because the evidence showed that the recognition of Good Friday as a secular

Spring holiday was "otherwise constitutional."[12] Importantly, *Granzeier* did not hold that evidence of past unconstitutional conduct is never probative evidence of present unconstitutional conduct. Rather, it held that where the remaining evidence shows that the government policy is "otherwise constitutional," past unconstitutional conduct does not preclude a finding of constitutionality. This holding is consistent with the Supreme Court's direction in *Santa Fe Indep. Sch.* that courts can, and must, look to prior unconstitutional practices when determining the primary purpose behind the government's present practices.

In looking to the context and history of Defendants' Ten Commandments displays, the court below found that "the history of these displays indicates that the defendants' overall purpose is religious in nature: to display the Ten Commandments." *McCreary II, supra* note 1, at 849. The district court, therefore, held that Defendants fourth and fifth purported secular purposes (to educate citizens regarding some of the documents that played a significant role in the foundation of the American and Kentucky systems of law and government) were primarily religious. *Id.* at 850. The district court found it "significant" that Defendants' original displays, containing only the Ten Commandments, "were erected in violation of the Supreme Court's clear ruling in Stone." *Id.* at

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[12] The evidence showed that Good Friday had become a holiday with significant "secular effects" (e.g., absent school children, high traffic volume from vacationers, and low activity at public offices and courts) and, therefore, the recognition of Good Friday as a secular holiday was permissible in the same way that Christmas Day and Thanksgiving are so recognized. *Id.* at 574-76.

849-50 (footnote omitted). "This defiance," according to the district court, "imprinted the defendants' purpose, from the beginning, with an unconstitutional taint observed not only by this court, but by anyone acquainted with this litigation." *Id.* at 850 (footnote omitted). The district court's finding is consistent with the Supreme Court's decision in *Santa Fe Indep. Sch.*, which compels courts to consider the government's past violations of the Establishment Clause when evaluating its present conduct, and with this Court's *Adland* decision, which authorizes courts to rely on evidence of such prior violations as proof that subsequently-added, secular components of an otherwise-unconstitutional display are an "afterthought."

The district court further noted that Defendants' amended displays (which were the subject of the court's original preliminary injunction) "accentuated the defendants' religious purpose, rather than diminishing it, by posting the Commandments along with "specific references to Christianity and texts that, while promulgated by the federal government, were chosen solely for their religious references." *McCreary II, supra* note 1, at 850 (citing *Pulaski*, 96 F. Supp. 2d at 699). Again, the district court was correct in concluding that the evolution of Defendants' Ten Commandments displays bore directly on the primary purpose behind the ultimate versions of the displays.

Based on "the history of the government's involvement in these displays," the district court held that the final version of the displays which portrayed the Ten Commandments alongside the full text of various historical documents and was erected allegedly "to educate the citizens of McCreary and Pulaski Counties and the schoolchildren of Harlan

County regarding the history of this nation's law and government," actually was done for a non-secular purpose. *Id.* The Court agrees with the district court insofar as the history of Defendants' involvement with the displays strongly indicated that the primary purpose was religious. This Court is concerned, however, that the district court appeared to afford exclusive weight to Defendants' past conduct without addressing the specific content of the revised displays. Nevertheless, as discussed in detail above, the content of the modified displays patently evidence a religious purpose, and the district court recognized as much in its subsequent discussion of the "endorsement" prong. *See id.* at 851. Accordingly, the district court did not clearly err in finding that Defendants' fourth and fifth avowed secular purposes – to educate citizens regarding some of the documents that played a significant role in the foundation of the American and Kentucky systems of law and government – fail the first prong of the Lemon test. For the same reasons, the district court did not clearly err in finding that Defendants' first three avowed secular purposes, which specifically mention the Ten Commandments, were predominated by a religious purpose.

Although the inquiry into the constitutionality of the displays could end here, inasmuch as failure under any one of the *Lemon* prongs deems governmental action violative of the Establishment Clause, *see Edwards*, 482 U.S. at 583, we shall address the "endorsement" prong of *Lemon* because the district court addressed the second prong as well.

b. "Endorsement" Prong of the *Lemon* Test

In determining whether Defendants' displays impermissibly endorse religion, this Court must ask "whether

an objective observer, acquainted with the text, legislative history, and implementation" of the displays would view them as state endorsement of religion. *Santa Fe Indep,. Sch. Dist.*, 530 U.S. at 308 (citations omitted); *Capital Square Review & Advisory Bd.*, 243 F.3d at 302. "In making this inquiry, [this Court] do[es] not allow a state 'to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions.'" *Adland*, 307 F.3d at 484 (quoting Pinette, 515 U.S. at 777). In addition, the inquiry must be viewed under the "totality of the circumstances surrounding the display." *Books*, 235 F.3d at 304. As a result, the Court must "look to both the specific content of the display and the context of its presentation." *Adland*, 307 F.3d at 484 (citing *Allegheny*, 492 U.S. at 598).

The Supreme Court decisions involving Christmas-time crèche displays demonstrate how the failure to integrate religious symbols with an overall secular theme can result in the impermissible endorsement of religion. In *Allegheny, supra*, the Court noted that "the crèche itself is capable of communicating a religious message." *Allegheny*, 492 U.S. at 598. The Court struck down a courthouse crèche display because nothing in the context of the display detracted from the crèche's religious message. *Id.* The Court distinguished the display from the one at issue in *Lynch*, *supra*, which had been composed of a "series of figures and objects, each group of which had its own focal point." *Id.* The *Lynch* display had included numerous purely secular symbols, such as a Santa Claus house, a lighted Christmas tree, a "talking" wishing well, a miniature village, a banner proclaiming "SEASONS GREETINGS," and candy-striped poles. *Lynch*, 465 U.S. at 671. In *Allegheny*, by contrast, "the crèche [stood] alone: it [was] the single element of the display" in the courthouse,

thereby sending "an unmistakable message that [the county] supports and promotes the Christian praise to God that is the crèche's religious message." *Allegheny*, 492 U.S. at 598-99. Thus, the crèche display in *Lynch* was permissible because the symbols shared a common secular link – the holiday season[13] – and the arrangement of the symbols conveyed that link to the display's observers. This secular link overcame any religious message that any one component of the display (i.e., the crèche) might otherwise have conveyed on its own.

The dissent appears to read *Lynch* and *Allegheny* to hold that a symbol which is wholly or partially religious no longer conveys its religious message when it is physically surrounded by wholly secular symbols. This overly-simplistic reading of the case law ignores the requirements that (a) the symbols be interconnected in a manner that is facially apparent to the observer and (b) the interconnection be secular in nature. For example, if Defendants in this case had substituted the Ten Commandments with a depiction of the Crucifixion or a religious sermon exhorting the citizenry to worship God and abide by the Ten Commandments, the religious messages would not have been subordinate to an overall secular theme simply because the religious document would have been surrounded by secular documents, such as the Declaration of Independence and the Magna Carta. Instead of blending in with an overall secular theme, the religious document, although physically contiguous, would have stood apart from the rest from a thematic point of view.

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[13] *Cf. Allegheny*, 492 U.S. at 596 (noting that Christmas is "a holiday with strong secular elements") (citing *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring)).

As to the composition of the displays in this case, the district court opined:

> The composition of the current set of displays accentuates the religious nature of the Ten Commandments by placing them alongside American historical documents. Given the religious nature of this document, placing it among these patriotic and political documents, with no other religious or moral codes of any kind, imbues it with a national significance constituting endorsement. The Ten Commandments are completely different from the remainder of the displays. The reasonable observer will see one religious code placed alongside eight political or patriotic documents, and will understand that the counties promote that one religious code as being on a par with our nation's most cherished secular symbols and documents. This is endorsement. . . . [T]he current set of displays conveys the counties' comment on the Ten Commandments' (and consequently, religion's) foundational value to our shared history as citizens; a reasonable person would perceive this message as endorsement.

McCreary II, supra note 1, at 851 (footnotes omitted). We agree with the district court's conclusion.

In *Books*, the Seventh Circuit held that "the placement of the American Eagle gripping the national colors at the top of the [Ten Commandments] monument hardly detracts from the message of endorsement; rather, it specifically links religion . . . and civil government." *Books*, 235 F.3d at 307. *See also Adland*, 307 F.3d at 486-87 (agreeing with the Seventh

Circuit's holding in *Books* that "the inclusion of an American eagle gripping the national colors at the top of the monument, serves to heighten the appearance of government endorsement of religion"). Here, the same can be said of Defendants' transparent attempt to "secularize" the displays by surrounding the Ten Commandments with other patriotic documents and symbols, such as the Bill of Rights and the Preamble to the Kentucky Constitution. *See Indiana Civil Liberties Union*, 259 F.3d at 773 (holding that display consisting of Bill of Rights, Preamble to Indiana Constitution and Ten Commandments would signal to the reasonable observer "that the state approved of such a link, and was sending a message of endorsement") (citing *Books*, 235 F.3d at 307).

Ultimately, the displays convey a message of religious endorsement because of the complete lack of any analytical connection between the Ten Commandments and the other patriotic documents and symbols. A reasonable observer of the displays cannot connect the Ten Commandments with a unifying historical or cultural theme that is also secular. All of the other documents relate in some fashion to Western European or American culture since 1215; several of the documents are legal in nature, one is an American symbol, one is an American slogan and one is an American song. The Ten Commandments are several thousands of years old, were not a product of European or American culture and, many believe, are the word of God. See Baruch J. Schwartz, *Ten Commandments, in The Oxford Dictionary of the Jewish Religion*, 683 (1997) (noting that in both Biblical accounts of the revelation of the Ten Commandments at Sinai, "[t]he 'Ten Words' were inscribed by God on the first set of Tablets given to Moses.") A reasonable observer would not be able to

link all of these texts to the foundation of American law and government; the displays' mere assertion of such a link does not cure the problem any more than a disclaimer stating that the Ten Commandments has been "adopt[ed] as the fundamental legal code of Western Civilization and the Common Law of the United States." *Stone*, 449 U.S. at 40 n.1 (holding that such a disclaimer is not sufficient to avoid a conflict with the First Amendment). *See also Adland*, 307 F.3d at 488 (noting that "'no sign can disclaim an overwhelming message of endorsement'") (quoting *Allegheny*, 492 U.S. at 619). Upon seeing the Ten Commandments, which sticks out in the displays like a proverbial "sore thumb," a "reasonable person will think religion, not history." *Indiana Civil Liberties Union* , 259 F.3d at 773 (holding that reasonable observer would not be able to make an analytical connection between Ten Commandments, Bill of Rights and Preamble to Indiana Constitution).

The district court further found that the location of the displays – in the McCreary and Pulaski County courthouses and Harlan County public schools – had "the effect of advancing religion." *McCreary II, supra* note 1, at 852. We agree. With regard to the school displays, it is noteworthy that the Supreme Court "has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Aguillard*, 482 U.S. at 583-84. This is because the public schools hold a position of trust that parents condition "on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family." *Id.* at 584. Public school students are especially impressionable due to the coercive power that the

State exerts through mandatory attendance requirements, "and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure." *Id.* (footnote and citations omitted). Thus, the presence of these displays in the schools enhances the underlying message of religious endorsement contained in the displays. As the Supreme Court has commented, if such displays "are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause." *Stone*, 449 U.S. at 42.

The citizenry exhibits a similar impressionability in the setting of a county courthouse, where the government carries out one of its quintessential functions – the enforcement of the civil and criminal laws. Typically, citizens are at the courthouse by necessity –whether they are on trial for a crime, have been subpoenaed as witnesses, are seeking to vindicate their civil rights, have been called to jury duty or are simply contesting parking tickets, registering to vote or renewing their driver's licenses. County courthouses also exude a coercive pressure, ranging from compulsory jury service to bench warrants to judicial decrees. Accordingly, a courthouse display of the Ten Commandments that conveys a religious message is nothing like a similar display in "a typical museum setting[;] though not neutralizing the religious content ..., [the museum setting] negates any message of endorsement of that content." *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring). As in *Books*, Defendants' courthouse displays posted at the seat of government, which "'is so plainly under government ownership and control' that every display on its property is marked implicitly with government approval." *Books*, 235

F.3d at 306 (quoting *Am. Jewish Congress v. City of Chicago*, 827 F.2d 120, 128 (7th Cir. 1987)).

Finally, the district court found that the history of the displays bolstered the reasonable observer's perception of the state endorsement of religion inasmuch as the observer is charged with knowing the history of the respective displays, and in each case the history indicates that the displays were originally intended to enshrine the Ten Commandments; it was only upon fear of litigation that the displays were modified to include secular material in the hope of rendering the displays constitutional. *McCreary II, supra* note 1, at 852. We agree with the district in this regard as well. *See Santa Fe Indep,. Sch. Dist.*, 530 U.S. at 308 (crediting the objective observer with being "acquainted with the text, legislative history, and implementation" of the displays). As a result, this Court concludes that the district court did not clearly err in finding that the displays have the impermissible effect of endorsing religion.[14]

2. Other Preliminary Injunction Factors

As Plaintiffs note in their brief, Defendants do not address the other three preliminary injunction factors on appeal and, therefore, have abandoned any argument as to these factors. However, because Plaintiffs have demonstrated a likelihood of succeeding on the merits of their Establishment Clause

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[14] The district court did not address the third *Lemon* factor and, therefore, neither shall we. As stated, failure under any one of the *Lemon* factors invalidates the challenged governmental action, and thus the third factor need not be addressed. *See Edwards*, 482 U.S. at 583.

claim, the other three preliminary factors follow in favor of granting the injunction. *See Connection Distrib. Co.*, 154 F.3d at 288 (finding that "[w]hen a party seeks a preliminary injunction on the basis of a potential violation of the First Amendment, the likelihood of success on the merits often will be the determinative factor").

III.

CONCLUSION

For the above-stated reasons, the district court's order requiring the removal of the displays from the McCreary and Pulaski County courthouses and from the Harlan County schools is AFFIRMED.

CONCURRENCE

JULIA SMITH GIBBONS, Circuit Judge, concurring. The district court's decision to grant plaintiffs-appellees' motion for a supplemental preliminary injunction enjoining the continued exhibition of the current displays was proper. With respect to the "secular purpose" prong of the test used to determine the constitutionality of the current displays, as set forth by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the majority opinion appropriately follows controlling precedent, and I generally agree with its

application of the law to the facts of this case.

In light of the inherently religious nature of the Ten Commandments, defendants-appellants' failure to articulate a facially secular purpose until after litigation had commenced, the "overtly religious" quality of the second display, *Am. Civil Liberties Union of Kentucky v. McCreary County, Kentucky*, 145 F.Supp.2d 845, 850 n.19 (E.D. Ky. 2001), the absence of any evidence in the record indicating that the Ten Commandments have been or will be integrated into the school curriculum as part of an appropriate program of study, the absence of any discussion integrating the Ten Commandments into a secular subject matter other than a conclusory assertion about the Declaration of Independence, and the emphasis on the Ten Commandments as the only religious text in the displays, plaintiffs-appellees have shown a strong or substantial likelihood of success on the merits of their claim that the displays lack a secular purpose. I therefore concur in the result. I write separately, however, to emphasize that, as the majority opinion notes, "the inquiry into the constitutionality of the displays could end here, inasmuch as failure under any one of the Lemon prongs deems governmental action violative of the Establishment Clause." Consequently, I express no opinion as to whether the displays violate the "effect/endorsement" prong of the Lemon test.

Finally, I offer two further observations relating to the dissenting opinion. First, the dissent concludes that the majority opinion questions a link between religion and our laws and government. In my view, the majority opinion says nothing whatsoever about this topic. Its subject is the application of the *Lemon* test to this particular case, and the only discussion to which the dissent could possibly refer in

reaching this conclusion concerns defendants' failure to include in the displays any support for their conclusory assertion about the relationship between the Ten Commandments and the Declaration of Independence.

Second, the dissent seeks to characterize the majority opinion's descriptions of the facts on which its conclusion rests as statements of broad rules. For example, the dissent says that the majority opinion creates rules that the government may display the Ten Commandments in a public building only if they are integrated into a secular curriculum and that any display must include a narration of proof of the relationship between religion and the foundation of American law. In my view, this reading of the majority opinion is unjustified. Rather, the majority considers the lack of integration of the displays into a secular curriculum and the lack of recited proof of a relationship between the Ten Commandments and the Declaration of Independence as factors that support a lack of secular purpose in this case and considers these factors, along with other evidence in this record, in reaching its result.

DISSENT

RYAN, Circuit Judge, dissenting. The majority holds that the displays mounted on the walls of the county courthouses in McCreary and Pulaski counties and in the school buildings

in Harlan County, Kentucky, offend the Establishment Clause of the First Amendment of the United States Constitution, and it affirms the district court's order that the displays be removed. I disagree and, with respect, must dissent.

The defendants' displays comport with the requirements of the Constitution in every respect, as is clearly indicated by the Supreme Court's two landmark cases permitting the use of religious symbols on public property: *Lynch v. Donnelly*, 465 U.S. 668 (1984), and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989). Rather than address these authorities in a meaningful fashion, the majority conjures a rule from the case of *Stone v. Graham*, 449 U.S. 39 (1980), a two-page, per curiam decision of the Court that preceded both *Lynch* and *Allegheny*, that was decided without the benefit of oral argument or briefs on the merits, and that bears no factual similarity to the case before us.

With one exception, the majority's analysis fails to properly apply the relevant Supreme Court precedent to the facts of the case before us. Inasmuch as my colleagues have expressed their disagreement with the reasoning that led the district court to conclude that the displays are unconstitutional, there is no need to point out why that is an eminently correct judgment. Nevertheless, having rejected much of the district court's analysis, the majority now affirms the judgment of that court by employing a wholly independent rationale that was not developed below and not presented to this court for review.

I.

As the majority has correctly said, the controlling law in

this case is the three-part "*Lemon* test" found in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as refashioned, it should be added, in *Lynch v. Donnelly*, 465 U.S. 668, and *County of Allegheny v. ACLU*, 492 U.S. 573. The *Lemon* test has proved difficult to apply in many Establishment Clause cases because its three elements are frequently ill-suited to ever more imaginative Establishment Clause challenges. Indeed, the Supreme Court has cautioned against mechanically applying the test to every Establishment Clause case, *Lynch*, 465 U.S. at 679, and has variously criticized, modified, and even ignored it. *See, e.g., Lamb's Chapel v. Ctr. Moriches Sch. Dist.*, 508 U.S. 384, 398-99 (1993) (Scalia, J., concurring) (citing cases).

Of the current members of the Supreme Court, six have criticized the *Lemon* test. For example, in *Wallace v. Jaffree*, 472 U.S. 38 (1985), then-Justice Rehnquist stated:

> [T]he Lemon test has no more grounding in the history of the First Amendment than does the wall theory upon which it rests. The three-part test represents a determined effort to craft a workable rule from a historically faulty doctrine; but the rule can only be as sound as the doctrine it attempts to service.

Id. at 110 (Rehnquist, J., dissenting). Justice O'Connor once called the analysis under the Lemon test "problematic" and warned that there are "certain difficulties inherent in the Court's use of the test." *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 346 (1987) (O'Connor, J., concurring in the judgment). Justice Stevens has lamented "the sisyphean task of trying to patch together the 'blurred, indistinct, and

variable barrier' described in *Lemon*." *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting). Also registering his dissatisfaction with *Lemon*, Justice Kennedy stated:

> I . . . do not wish to be seen as advocating, let alone adopting, [the *Lemon*] test as our primary guide in this difficult area. Persuasive criticism of *Lemon* has emerged. Our cases often question its utility in providing concrete answers to Establishment Clause questions, calling it but a helpful signpos[t] or guidelin[e], to assist our deliberations rather than a comprehensive test. Substantial revision of our Establishment Clause doctrine may be in order.

Allegheny, 492 U.S. at 655-56 (Kennedy, J., concurring in the judgment in part and dissenting in part) (internal quotation marks and citations omitted). Finally, Justice Thomas joined the refrain when he signed on to a dissent written by Justice Scalia, the Court's severest critic of *Lemon*, who had this to say about the much-maligned test:

> Our Religion Clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with our long-accepted constitutional traditions. Foremost among these has been the so-called *Lemon* test, which has received well-earned criticism from many Members of this Court.

Lee v. Weisman, 505 U.S. 577, 644 (1992) (Scalia, J., joined by, *inter alios*, Thomas, J., dissenting) (citation omitted).

The Court has also modified the *Lemon* test by adopting Justice O'Connor's "endorsement test" from *Lynch*:

> [Justice O'Connor's] concurrence articulates a method for determining whether the government's use of an object with religious meaning has the effect of endorsing religion. The effect of the display depends upon the message that the government's practice communicates: the question is "what viewers may fairly understand to be the purpose of the display."

Allegheny, 492 U.S. at 595 (quoting *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring)). The test has been further modified by "fold[ing] the entanglement inquiry into the primary effect inquiry." *Zelman v. Simmons-Harris*, 536 U.S. 639, 668 (2002) (O'Connor, J., concurring).

In some cases, the Supreme Court has simply ignored the *Lemon* test. In *Larson v. Valente*, 456 U.S. 228 (1982), the Court, holding that Minnesota's charitable solicitation statute violated the Establishment Clause, stated that the "application of the *Lemon* tests is not necessary to the disposition of the case before us." *Id.* at 252. Chief Justice Warren Burger, himself the author of *Lemon*, also declined to apply the test in an Establishment Clause challenge to Nebraska's practice of paying a chaplain to offer prayers at the opening of the state's legislative sessions. *See Marsh v. Chambers*, 463 U.S. 783 (1983).

Not surprisingly, the Court has consistently emphasized that the *Lemon* test is not the *sine qua non* of Establishment Clause jurisprudence. In *Mueller v. Allen*, 463 U.S. 388 (1983), the Court stated that the *Lemon* test "provides 'no

more than [a] helpful signpos[t]' in dealing with Establishment Clause challenges." *Id.* at 394 (quoting *Hunt v. McNair*, 413 U.S. 734, 741 (1973)). And in *Lynch*, citing cases in which it did not utilize the Lemon test at all, the Court stated: "[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area." 465 U.S. at 679. In the *Lemon* case itself, the Supreme Court grappled with the question whether statutes in Pennsylvania and Rhode Island that authorized limited state financial aid to church-related schools violated the Establishment Clause. The Court said they did, because neither statute could pass the new test Chief Justice Warren Burger conjured, mid-opinion, which provides:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; [and] finally, the statute must not foster an excessive government entanglement with religion.

Lemon, 403 U.S. at 612-13 (internal quotation marks and citations omitted).

Over the years, the Supreme Court has broadened the test to apply not only to legislative enactments, but to any government action. For example, in *Widmar v. Vincent*, 454 U.S. 263 (1981), the Court applied the test to a university policy that excluded religious groups from a public forum. After experiencing considerable difficulty applying the test to various Establishment Clause challenges, especially its second part which proscribes government action whose primary effect either advances or inhibits religion, the Court modified that part of the test to prohibit government action

that has the principal or primary effect of "endorsing" religion. *Allegheny*, 492 U.S. at 595 (citing *Lynch*, 465 U.S. at 691-94 (O'Connor, J., concurring)).

While judges, lawyers, and constitutional law scholars continue to criticize *Lemon*, and repeatedly urge the Supreme Court to fashion a new, more workable test for determining whether a unit of government has made a "law respecting an establishment of religion," U.S. Const. amend. I, we (the lower federal courts) are stuck with the three-part Lemon test, and we must apply it in this case.

Having done so, I conclude that the three displays the plaintiffs have challenged, easily and obviously pass the Lemon test, and that, perforce, my colleagues' conclusion to the contrary is mistaken.

II.

The majority opinion has partially misstated the proper standard of review in this case. It is certainly true that we review a district court's decision to grant a preliminary injunction for an abuse of discretion. *Sandison v. Mich. High Sch. Athletic Ass'n*, 64 F.3d 1026, 1030 (6th Cir. 1995). However, in determining whether the district court abused its discretion, we review its findings of fact for clear error and its legal conclusions de novo. *Id.* Moreover, we will overturn a district court's decision to grant a preliminary injunction "if the district court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard." *Blue Cross & Blue Shield Mut. v. Blue Cross & Blue Shield Ass'n,* 110 F.3d 318, 322 (6th Cir.

1997). In this case, because the district court based its decision to grant the injunction on the legal conclusion that the displays failed the purpose and effect prongs of the Lemon test, that conclusion should properly be reviewed de novo.

III.

What the district court and my colleagues have held unconstitutional is an arrangement of ten framed documents on the courthouse lobby walls in McCreary and Pulaski counties and in the Harlan County school buildings.

The courthouse displays consist of the following documents:

1. The Star Spangled Banner;

2. The Declaration of Independence;

3. The Mayflower Compact;

4. The Bill of Rights;

5. The Magna Carta;

6. The National Motto;

7. The Preamble to the Kentucky Constitution;

8. The Ten Commandments;

9. A printed figure of the Lady Justice; and

10. An explanatory sign identifying the foregoing documents and stating that the entire display is of "documents that played a significant role in the foundation of our system of law and government."

In addition, the courthouse displays are prominently identified as: "Foundations of American Law and Government Display."

The Harlan County School Board display is essentially identical to the McCreary and Pulaski courthouse displays, except that it is not identified as the "Foundations of American Law and Government Display," and the Lady Justice document and the explanatory sign are omitted. In their places are the text of Kentucky Revised Statute § 158.195, authorizing the posting of historical displays, and a lengthy Harlan County School Board resolution, stating, among other things, that the "many documents [comprising the display], taken as a whole, have special historical significance to our community, our country, and our country's history." No one of the framed documents in any of the displays has, by its size or location in the arrangement, any greater prominence than any other.

The defendants claim their purposes were to assemble and post in the courthouse and school district buildings, an array of historical documents that, taken together, have the educational and patriotic value of illustrating some of the ideas and influences that "were part of the foundation of American Law and Government" and "played a significant role in the development, origins or foundations of American

or Kentucky law." *ACLU v. McCreary County* (*McCreary II*), 145 F. Supp. 2d 845, 848 (E.D. Ky. 2001) (internal quotation marks and citations omitted). They argue that these purposes are entirely secular.

The district court correctly summarized the defendants' secular purposes as follows:

1.To erect a display containing the Ten Commandments that is constitutional;

2.To demonstrate that the Ten Commandments are part of the foundation of American law and government;

3.To include the Ten Commandments as part of the display for their significance in providing the moral background of the Declaration of Independence and the foundation of our legal tradition;

4.To educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government; and

5.As designated by the Harlan School Board, to create a limited public forum on designated walls within the school district for the purpose of posting historical documents that played a significant role in the development, origins, or foundations of American and Kentucky law.

See id.

IV.

Inquiry into the constitutionality of the defendants' displays must begin, as I have said, with the Supreme Court case of *Lemon v. Kurtzman*, 403 U.S. 602. That inquiry, of necessity, includes *Lynch v. Donnelly*, 465 U.S. 668, and *County of Allegheny v. ACLU*, 492 U.S. 573, in which the Supreme Court directly addressed the issue of whether a government may display an inherently religious, even sectarian symbol, on public property. The Court held in both *Lynch* and *Allegheny* that a government may use a religious symbol to accomplish a secular purpose, if the symbol is displayed in a way that does not create an impression of endorsement in the mind of the reasonable observer. A review of the facts in this case indicates that the defendants have rigorously complied with the criteria established by the Court in both Lynch and Allegheny, and that their displays in no way constitute an establishment of religion.

A.

The first question we must consider under the *Lemon* test is whether the government's display has a secular purpose. *Lemon*, 403 U.S. at 612. "A statute or practice that is motivated in part by a religious purpose may satisfy the first *Lemon* criterion so long as it is not motivated entirely by a purpose to advance religion." *ACLU v. City of Birmingham*, 791 F.2d 1561, 1565 (6th Cir. 1986).

Furthermore, the Supreme Court has informed us that we have "no license to psychoanalyze . . . legislators" and that we must refrain from ascribing improper motives to legislators who "express[] a plausible secular purpose." *Wallace*, 472

U.S. at 74. If the government offers an explanation of its purpose, that explanation is owed deference by the judiciary unless and until shown to be a "sham," for "[w]e must be cautious about attributing unconstitutional motives to state officials." *Chaudhuri v. Tennessee*, 130 F.3d 232, 236 (6th Cir. 1997).

Five legitimate secular purposes motivated the defendants to erect the displays in their current format. First, the defendants desired to erect a display of the Ten Commandments that is constitutional. I find in this stated desire nothing that even hints at a primarily religious purpose, much less a sham. Neither the Supreme Court, nor this court, nor any federal appellate court, insofar as I know, has ever suggested that displaying the Ten Commandments is an impermissible objective under the Establishment Clause. In fact, quite the contrary is true. As we stated on one occasion:

> [W]e believe that the Supreme Court's opinion in Stone and Justice Stevens' statements in Allegheny not only acknowledge that the Ten Commandments may be constitutionally displayed, they provide considerable guidance how they can be displayed.

Adland v. Russ, 307 F.3d 471, 489 (6th Cir. 2002), cert. denied, 123 S. Ct. 1909 (2003).

Similarly, there is no reason to doubt the legitimacy of the second and third secular purposes for the displays, namely, to demonstrate that the Ten Commandments were part of the foundation of American law and government, and to recognize the significance of the Ten Commandments in providing the moral and cultural background of the

Declaration of Independence and the foundation of our legal tradition. With respect to these two iterations of the defendants' secular purposes, the majority singles out the Declaration of Independence and complains that "[t]here is by no means a consensus . . . that the source of Thomas Jefferson's belief in divinely-bestowed, unalienable rights, to the extent this belief inspired the writing of the Declaration, was the Ten Commandments or even the Bible." Maj. op. at 25. In fact, the majority seems to hold that no government could ever plausibly proclaim the religious heritage of this nation because the prevailing view among historians is that our founders were primarily inspired by secular influences. *See id.* Not only is this observation a complete non sequitur, it is highly debatable as an historical matter. But more significantly, the source of Thomas Jefferson's "belief in divinely-bestowed, unalienable rights" proclaimed in the Declaration of Independence is utterly immaterial, because it does not resolve the real issue before us today, which is whether the defendants' avowed secular purposes are shams. The Declaration of Independence is not the sole source of evidence that religion, of which the Ten Commandments are a nearly universal symbol, was a significant influence upon the foundation of American law and government. My colleagues' interesting diversion about Thomas Jefferson, the Declaration of Independence, and the Bible offers no basis whatever to conclude, as a matter of law, as my colleagues do, that the defendants' avowed secular purposes are shams.

The influence of religion upon American law and government is a fact of American history and politics that has been widely recognized by scholars, jurists, legislators, presidents, and, not least, the Founders themselves.

In his Farewell Address to the nation, George Washington stated that religion was not only a part of the foundation of our law and government, it was a necessity:

> Of all the dispositions and habits which lead to political prosperity, Religion and morality are indispensable supports. In vain would that man claim the tribute of Patriotism, who should labour to subvert these great Pillars of human happiness, these firmest props of the duties of Men and citizens. The mere Politician, equally with the pious man ought to respect and to cherish them. A volume could not trace all their connections with private and public felicity. . . . Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle.

George Washington, *Farewell Address* (Sept. 19, 1796), in 1 *The Founder's Constitution* 681, 684 (Philip B. Kurland & Ralph Lerner eds., 1987). Similarly Thomas Jefferson, in his First Inaugural Address, listed religion as one of the necessary sources of our nation's prosperity:

> [E]nlightened by a benign religion, professed, indeed, and practiced in various forms, yet all of them inculcating honesty, truth, temperance, gratitude, and the love of man; acknowledging and adoring an overruling Providence, which by all its dispensations proves that it delights in the happiness of man here and his greater happiness hereafter—with all these blessings, what more is necessary to make us a happy

and a prosperous people?

Thomas Jefferson, *First Inaugural Address* (Mar. 4, 1801), in *id.* 140, 141.

In fact, in recognition of religion's foundational role in our law and government, both Thomas Jefferson and Benjamin Franklin independently proposed that the new American seal depict Moses leading Israel through the wilderness under the protection of God, with the motto, "Rebellion to Tyrants is Obedience to God." James H. Hutson, *Religion and the Foundation of the American Republic* 50-51 (1998). Although the Continental Congress never accepted Jefferson's and Franklin's proposals, it did adopt a seal with numerous religious references. "What is unmistakable . . . is the theistic framework in which the Continental Congress sought to have the world understand the creation of the American republic." Derek H. Davis, *Religion and the Continental Congress, 1774-1789: Contributions to Original Intent* 144 (Oxford Univ. Press 2000).

Like Washington, the Continental Congress also drew the connection between religion and government. On October 11, 1782, in a Thanksgiving proclamation near the end of the Revolutionary War, the Congress asked Americans

> to testify their gratitude to God for his goodness, by a cheerful obedience to his laws, and by promoting . . . the practice of true and undefiled religion, which is the great foundation of public prosperity and national happiness.

23 *Journals of the Continental Congress, 1774-1789*, 647

(Gaillard Hunt ed., Government Printing Office 1914). These same sentiments were expressed by the Congress the day after the First Amendment was proposed when it urged President Washington to proclaim "'a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many signal favours of Almighty God.'" *See* Davis, *supra* at 89 (citation omitted).

President John Adams likewise described the importance of religion to the American system of government:

> As the safety and prosperity of nations ultimately and essentially depend on the protection and the blessing of Almighty God, and the national acknowledgment of this truth is not only an indispensable duty which the people owe to Him, but a duty whose natural influence is favorable to the promotion of that morality and piety without which social happiness can not exist nor the blessings of a free government be enjoyed.

John Adams, *Fast Day Proclamation* (Mar. 23, 1798), in *A Compilation of the Messages and Papers of the Presidents, 1789-1897*, 268, 268-69 (James D. Richardson ed., 1899).

These are only a few of the numerous statements by our early political leaders drawing the same conclusion as did the defendants in this case: that religion played a foundational role in American law and government. This is a conclusion, incidentally, that is widely accepted by scholars. As one of the earliest observers of American political life, Alexis de Tocqueville recognized, religion is an essential component of American government:

> Religion in America takes no direct part in the government of society, but it must be regarded as the first of the political institutions; for if it does not impart a taste for freedom, it facilitates the use of it. Indeed, it is in this same point of view that the inhabitants of the United States themselves look upon religious belief. I do not know whether all Americans have a sincere faith in their religion—for who can search the human heart?—but I am certain that they hold it to be indispensable to the maintenance of republican institutions.

Alexis de Tocqueville, *Democracy in America* 305-06 (Alfred A. Knopf, Inc. 1972) (1835). De Tocqueville's observation is confirmed by historical scholarship:

> As intellectual heirs of a tradition which had entwined republicanism and Christian theism, New Englanders in the last two decades of the [eighteenth] century were unable to perceive religion as free from matters of civil government. From ancient history they were convinced that "the state cannot stand without religion" and from their own experience that "Rational Freedom cannot be preserved without the aid of Christianity."

Nathan O. Hatch, *The Sacred Cause of Liberty: Republican Thought and the Millennium in Revolutionary New England* 168 (Yale Univ. Press 1977) (footnotes and citations omitted). The distinguished jurist and professor of law, Thomas M. Cooley, also recognized the close relationship between religion and American law:

> It was never intended that by the Constitution the government should be prohibited from recognizing religion . . . . The Christian religion was always recognized in the administration of the common law; and so far as that law continues to be the law of the land, the fundamental principles of that religion must continue to be recognized in the same cases and to the same extent as formerly.

Thomas M. Cooley, *The General Principles of Constitutional Law in the United States of America* 205-06 (The Lawbook Exchange 2000) (1880).

Relevant to our purposes here, the Supreme Court has repeatedly stated that there is a crucial link between religion and our laws and government, for "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). This link has been consistently celebrated by our political leaders from the founding to the present day and nowhere has this practice been questioned as fiercely as the majority does today. In fact, the majority's incredulity as to the avowed relationship between religion and our public life is unprecedented:

> There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789. . . .
>
> Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders.

Lynch, 465 U.S. at 674-75.

With regard to the Ten Commandments, the legitimacy of the defendants' view of American history as expressed in their displays is supported by the Supreme Court's own appraisal of its Establishment Clause precedent:

> [I]n *Stone* . . . [our] decision forbidding the posting of the Ten Commandments did not mean that no use could ever be made of the Ten Commandments, or that the Ten Commandments played an exclusively religious role in the history of Western Civilization.

Edwards v. Aguillard, 482 U.S. 578, 593-94 (1987).

Moreover, every one of our sister circuits that has considered a challenge to the public display of the Ten Commandments has recognized its foundational role in American law and government and, consequently, has declared that such displays can have a secular purpose.

Most recently, the Fifth Circuit in *Van Orden v. Perry*, No. 02-51184, 2003 WL 22664490 (5th Cir. Nov. 12, 2003), approved of a granite monument inscribed with the Ten Commandments and displayed at the Texas Capitol. Having concluded that the State had a valid secular purpose for the display, the court also affirmed the relationship between the Ten Commandments and American law:

> To say this is not to diminish the reality that it is a sacred text to many, for it is also a powerful teacher of ethics, of wise counsel urging a regimen of just governance among free people. The power of that

> counsel is evidenced by its expression in the civil and criminal laws of the free world. No judicial decree can erase that history and its continuing influence on our laws--there is no escape from its secular and religious character.

Id. at *7.

In *Freethought Society v. Chester County*, 334 F.3d 247 (3d Cir. 2003), the Third Circuit upheld the display of a bronze plaque inscribed with the Ten Commandments that hung alone on the exterior of a county courthouse. The county commissioners had stated at trial that they wanted to maintain the plaque, in part, because they believed that the Ten Commandments contributed to the development of American law. The court held that this was a "'non-sham' secular purpose" and that there was a

> well documented history . . . to the effect that the Ten Commandments have an independent secular meaning in our society because they are regarded as a significant basis of American law and the American polity.

Id. at 267.

The Eleventh Circuit recently approved of a court clerk seal that included an outline of two stone tablets inscribed with the Roman numbers I through X, because the Ten Commandments are a popularly recognized symbol of the law. *King v. Richmond County, Ga.*, 331 F.3d 1271, 1278 (11th Cir. 2003). In its consideration of the seal's secular purpose, the court was satisfied "that during the 1870s the

outline of the Ten Commandments presumably would have enabled illiterate citizens to recognize the legal validity of documents displaying the Seal." *Id.*

The Seventh Circuit, while striking down as unconstitutional a large granite monument bearing an inscription of the Ten Commandments, situated on the Elkhart, Indiana, City Hall grounds, nonetheless noted:

> The display of a religious symbol still may, under certain circumstances, have a secular purpose. The text of the Ten Commandments no doubt has played a role in the secular development of our society and can no doubt be presented by the government as playing such a role in our civic order.

Books v. City of Elkhart, 235 F.3d 292, 302 (7th Cir. 2000).

The Tenth Circuit, using the *Lemon* test, approved of the display of a granite Ten Commandments monument at a city-county courthouse in Salt Lake City. *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir. 1973). In doing so, the court stated that

> the Decalogue is at once religious and secular, as, indeed, one would expect, considering the role of religion in our traditions. . . .
>
> It does not seem reasonable to require removal of a passive monument, involving no compulsion, because its accepted precepts, as a foundation for law, reflect the religious nature of an ancient era. . . . [W]e cannot say that the monument, as it stands, is more

> than a depiction of a historically important monument with both secular and sectarian effects.

Id. at 33-34. Although *Anderson* predates the Supreme Court's decisions in *Stone*, *Lynch*, and *Allegheny*, neither the Supreme Court nor the Tenth Circuit has overruled *Anderson* and it remains good law. *See Summum v. Callaghan*, 130 F.3d 906, 912 n.8 (10th Cir. 1997).

Thus, in their reasoned judgment, our sister circuits that have had the opportunity to consider this question have unanimously declared the validity of the very same premise that the defendants advance here today: "The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country." This judgment is not precluded by any decision of this court, and, in fact, would seem to be welcomed by it. Having had the opportunity to consider the place of the Ten Commandments in our public life, we have never rejected the historical relationship between the Ten Commandments and our law and government. In *Adland v. Russ*, 307 F.3d 471, we struck down a Kentucky legislative resolution directing that a six-foot tall granite monument inscribed with the Ten Commandments be displayed on the lawn at the State Capitol. The monument, which was totally different from the display at issue here, was essentially a stand alone piece, save for an accompanying clock and some small plaques nearby. Notwithstanding our objections to the monument in that case, we explicitly acknowledged that the Commonwealth could cure the defects in the display. Although we declined to render an advisory opinion on the constitutionality of alternative displays, we applauded the plaintiffs for proposing "to their credit, . . . a historical display showcasing the various

influences on our law by both secular and religious sources." *Id.* at 489-90 (emphasis added).

This collection of sources is not intended to settle the issue of whether the Decalogue is in fact a foundational document in American law and government, for that is not the question before us today. What we must decide is whether the displays were motivated by a secular purpose. In answering that particular question, our only concern is with the defendants' subjective belief, because government action will fail the purpose prong of the Lemon test if the "government intends to convey a message of endorsement or disapproval of religion." *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring). Specifically, given the defendants' articulation of a secular purpose, we must consider whether such a purpose is a sham, i.e., whether the defendants subjectively believed that the Decalogue was part of the foundation of American law and government and that it provided the moral background of the Declaration of Independence and the foundation of our legal tradition.

Not only is the record utterly devoid of any evidence that the defendants subjectively intended to convey a message of endorsement, but the historical evidence dispels any suspicion that the defendants' theory of American law and history is a sham. In common, ordinary English usage, a sham means a fraud, a hoax, or an intentionally deceptive counterfeit. *See* 15 *Oxford English Dictionary* 159 (2d ed. 1989). Given the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life," *Lynch*, 465 U.S. at 674, and the consistent view of the courts that "[t]he text of the Ten Commandments no doubt has played a role in the secular development of our society,"

Books, 235 F.3d at 302, it cannot plausibly be said that the defendants' desire to demonstrate the foundational role of the Ten Commandments is a fraud or hoax. The voluminous historical evidence, common sense, and the decisional law of the federal courts all lead to one inevitable conclusion in the case before us: that the defendants' second and third articulated purposes are not shams and should, therefore, be accepted by this court as legitimate secular purposes.

Similarly, there is no evidence in the record that would justify this court in questioning the sincerity of the defendants' fourth articulated purpose: to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government. The displays unquestionably contain numerous documents in "a historical display showcasing the various influences on our law by both secular and religious sources." *Adland*, 307 F.3d at 490. Lest there be any confusion about the displays' educative purpose, the defendants have posted signs explaining that all the documents "played a significant role in the foundation of our system of law and government." The signs go on to describe in considerable detail the significance of each document, including the Ten Commandments, which, the defendants assert, "provide[d] the moral background of the Declaration of Independence and the foundation of our legal tradition." As my earlier discussion of the historical evidence indicates, the defendants' purpose of educating their citizens about the relationship between religion and the American system of law and government is grounded in clear and indisputable fact and, as such, cannot be justifiably characterized as a sham. In their assessment of the relationship between religion and the Declaration of Independence, the defendants got it absolutely

right:

> [T]he numerous references to God were enough to place the Declaration in an overall theistic framework so as to satisfy virtually anyone who held a theistic worldview. Thus in drafting the Declaration of Independence, Thomas Jefferson and his congressional colleagues seized upon, and indeed helped to further shape, a bond between Enlightenment latitudinarianism and Christian orthodoxy that made it possible to formally dissolve all bonds with Great Britain and at the same time confidently assert "the protection of Divine Providence."

Davis, supra at 109.

Nevertheless, according to my colleagues, the displays in this case are defective because they "provided the viewer with no analytical or historical connection between the Ten Commandments and the other historical documents," maj. op. at 27, and, thus, fail to prove conclusively the defendants' thesis: that the Decalogue has a historical connection to American law and government. The majority rejects the evidence, as it appeared in the defendants' brief, "that each of the Ten Commandments were codified, to one extent or another, into the legal codes of some American Colonies, and that some of the Commandments . . . persist to this day in American legal codes." Maj. op. at 24. In doing so the majority complains that this "evidence does not appear in the actual display of the Ten Commandments, so an observer would not actually be made aware of these facts." Maj. op. at 24. Thus, the majority seems to envision a display that

contains a recounting of the history of the nation's founding, a summary of American constitutional law and history, perhaps a syllogism incorporating the foregoing, and, I suppose, at least as much evidence as was presented to this court in the official record of more than 200 pages.

In support of their reasoning, my colleagues cite *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam), a case that the majority has both misapplied and misinterpreted and that, nevertheless, bears no factual relation to the case before us. *Stone* was a case about the constitutionality of a Kentucky statute mandating the posting of a copy of the Ten Commandments, standing alone, in every school classroom in Kentucky. Acting upon a petition for a writ of certiorari, and without benefit of oral argument or briefing on the merits, the Court, in a two-page, per curiam opinion from which four justices dissented, summarily reversed the Kentucky Supreme Court's judgment of constitutionality, stating:

> We conclude that Kentucky's statute requiring the posting of the Ten Commandments in public schoolrooms had no secular legislative purpose, and is therefore unconstitutional.

Id. at 41. Noting that the Court's holding was without precedent, then-Justice Rehnquist called the decision "a cavalier summary reversal" having "no support beyond [the Court's] own ipse dixit." *Id.* at 43, 47 (Rehnquist, J., dissenting).

Although they cite no authority, my colleagues are apparently relying on *Stone* when they state that "a purported historical display must present the Ten Commandments

objectively and integrate them with a secular message." Maj. op. at 18. If this is, in fact, the rule that my colleagues glean from *Stone*, it is not the rule they apply to the facts of the case before us. Rather, the defendants are faulted because they did not choose to display the Ten Commandments in "the most logical way," which the majority defines as "integrating the Ten Commandments with a secular curriculum, such as through the objective study of history, ethics or comparative religion." Maj. op. at 18. This is the actual standard by which my colleagues judge the defendants' displays. Accordingly, my colleagues condemn the defendants' displays because "the Ten Commandments are not integrated with a secular study of American law or government," maj. op. at 21 (emphasis added), and because of "the lack of a demonstrated analytical or historical connection with the other documents [in the displays]," maj. op. at 23 (emphasis added). These criticisms demonstrate that my colleagues think that it is no longer sufficient for a display to serve a secular purpose, for the majority now demands that such a display be "integrat[ed] . . . with a secular curriculum." Maj. op. at 18.

It should first be observed that there is no obligation to display the Ten Commandments in an otherwise secular exhibit in a way that appeals to the logic of scrutinizing federal judges. I am not aware of any authority that would require us to condemn a government display simply because it did not choose "the most logical way" of conveying a message. Furthermore, insofar as the majority relies on *Stone* for guidance in forming its rule that "a purported historical display must present the Ten Commandments objectively and integrate them with a secular message," maj. op. at 18, it is better to quote this portion of Stone in full. What the Court actually said in Stone was the following:

> This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like.

Stone, 449 U.S. at 42. Clearly, this statement by the Court is a gratuitous hypothetical, describing one possible scenario in which the Kentucky legislature could have mandated the use of the Ten Commandments in the classroom. But this hypothetical simply does not establish a rule that all efforts to post the Ten Commandments on public property must integrate them into a curriculum of study. If that were the case, the Court would have to condemn its own display of Moses, who, bearing the Ten Commandments, is represented among other historical figures in a frieze on the south wall of the Supreme Court courtroom:

> Placement of secular figures such as Caesar Augustus, William Blackstone, Napoleon Bonaparte, and John Marshall alongside [Moses, Confucius, and Mohammed], however, signals respect not for great proselytizers but for great lawgivers. It would be absurd to exclude such a fitting message from a courtroom, as it would be to exclude religious paintings by Italian Renaissance masters from a public museum.

Allegheny, 492 U.S. at 652-53 (footnote omitted) (Stevens, J., concurring in part and dissenting in part).

Rather than attempting to divine a rule from *Stone*, this court should apply the actual rules from the Supreme Court's

landmark decisions approving the government's use of religious symbols: *Lynch* and *Allegheny*. It is revealing that my colleagues are unable to offer any meaningful citation to either of these cases to support their reasoning. This is not surprising given the fact that the Court has never even suggested that there is any validity to the rules my colleagues have crafted today: that a government may display the Ten Commandments in a public building only if they are integrated into a secular curriculum, and that the display must include a narration of the proof of the relationship between religion and the ideas and impulses that contributed to the foundation of American law and government.

In *Lynch*, the Court approved of the use of a crèche in a Christmas display that contained other symbols of the holiday such as a Santa Claus house and reindeer, even though the display contained no signs explaining the secular purpose of the display and the defendants made no attempt to demonstrate the link between the crèche and the celebration of Christmas. Despite the defendant's failure to integrate the crèche into "a secular curriculum, such as . . . the study of history, ethics or comparative religion," see maj. op. at 18, the Court held that the defendant had nonetheless achieved its purpose of "tak[ing] note of a significant historical religious event long celebrated in the Western World." *Lynch*, 465 U.S. at 680.

Similarly in *Allegheny*, where the Court approved of a Christmas display containing a Christmas tree, a menorah, and a sign bearing the phrase "Salute to Liberty," there is not even a hint of the need to integrate the menorah into a secular curriculum. The only other message at the menorah display was the following: "'During this holiday season, the city of

Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom.'" *Allegheny*, 492 U.S. at 582 (citation omitted). Justice Blackmun concluded that this "sign serves to confirm what the context [of the display] already reveals: that the display of the menorah is not an endorsement of religious faith but simply a recognition of cultural diversity." *Id.* at 619 (Blackmun, J., concurring). Thus, the defendant was able to achieve the secular purpose of recognizing cultural diversity merely through the context of the display, and not by integrating the menorah into a secular curriculum. Moreover, the defendant's sign confirmed that same secular purpose even though it made no mention of diversity and, therefore, required the reader to make an inferential step in order to draw the connection between "our legacy of freedom" and the "recognition of cultural diversity."

Thus, neither *Lynch*, nor *Allegheny*, nor any other decision, and certainly not *Stone*, support the majority's rule that a government that wishes to use a religious symbol in a public display must integrate that symbol into a secular curriculum. As if the absence of authority were not enough, common sense militates against such a rule. Government monuments and displays appear in a context in which the displays must speak for themselves, for they do not present an opportunity to attach lengthy disclaimers and statements of purpose. However, in order to integrate the Ten Commandments into a secular curriculum in a manner that would satisfy the majority's new rule, the defendants would have to append to their displays a library of learned treatises and court briefs, or perhaps audio or video accompaniment, explaining beyond all reasonable doubt and in great detail what most Americans already know and the courts have expressly recognized: that

"the Ten Commandments no doubt has played a role in the secular development of our society." *Books*, 235 F.3d at 302. Significantly, the majority has dismissed out of hand the signs accompanying the displays, which, among other things explain that "[t]he Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country." This statement succinctly describes the secular purposes for the displays and, under *Lynch* and *Allegheny*, is more than sufficient.

In its review of the context of the defendants' displays, the majority objects that the displays are "blatantly religious" because they contain an "active symbol of religion" "'concern[ing] the religious duties of believers.'" Maj. op. at 30 (quoting *Stone*, 449 U.S. at 42). This, again, is a novel statement of the law that finds no support in the Supreme Court's landmark decisions of *Lynch* and *Allegheny*. In *Lynch*, the Court approved the display of the crèche despite the fact that the crèche has "special meaning to those whose faith includes the celebration of religious Masses." *Lynch*, 465 U.S. at 685. In *Allegheny*, the Court approved of the display containing the menorah even though it also concerned certain religious duties of the Jewish faith:

> [T]he Talmud prescribes that it is a mitzvah (i.e., a religious deed or commandment) . . . for Jews to place a lamp with eight lights just outside the entrance to their homes or in a front window during the eight days of Chanukah.

Allegheny, 492 U.S. at 583 (emphasis added) (footnote omitted). In both cases, the Court held that these religious icons, which necessarily concerned the religious duties of

believers, were also symbols of a holiday that had both secular and religious meaning. *See Lynch*, 465 U.S. at 680; *Allegheny*, 492 U.S. at 613-14. Therefore, simply because the Ten Commandments may prescribe religious duties for Jews and Christians, that fact alone does not detract from its place as a symbol of the religious origins of our law and government.

Finally, there is no evidence that would undermine the defendants' fifth articulated purpose: to create a limited public forum on the walls of the Harlan County school buildings for the purpose of posting historical documents that played a significant role in the development, origins, or foundations of American and Kentucky law. "The establishment of a public forum is a laudable goal, and part of a worthy tradition dating back to the Greek agora and the Roman forum." *Americans United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1543 (6th Cir. 1992). There is simply no indication in the record that the defendants have manipulated the forum in any way or have excluded other speakers from using the forum in a manner that would cause us to believe that this purpose is a sham. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995) (plurality opinion).

The majority raises an objection to the "evolution" of the displays. In doing so, it adopts the reasoning of the district court, which held that the history of the defendants' earlier attempts to erect constitutionally invalid displays conclusively "imprinted the defendants' purpose, from the beginning, with an unconstitutional taint[.]" *McCreary II*, 145 F. Supp. 2d at 850. This theory of indelible, unconstitutional "taint" not only offends common sense, it is also contrary to the law of this

circuit.

We have explicitly rejected the idea that the government's past unconstitutional conduct forever taints its actions in the future. In *Granzeier v. Middleton*, 173 F.3d 568 (6th Cir. 1999), we considered whether closing government offices on Good Friday was done for a religious purpose, violating the Establishment Clause. The county's claimed secular purpose was that Good Friday had become part of an extended spring weekend in which many people took a short vacation and very little business was conducted. As evidence that this explanation was a sham, the plaintiffs produced a government sign the defendant had previously posted that depicted a crucifix and stated that the offices were being closed in observance of Good Friday. We rejected the plaintiffs' contention that the defendant's earlier religious purpose forever tainted the secular purpose it proffered at trial. "[T]he fact that a particular closing was once constitutionally suspect does not prevent it from being reinstated in a constitutional form." *Id.* at 574.

We noted our agreement with Judge Posner of the Seventh Circuit who reasoned in a case factually similar to *Granzeier*, that "Illinois can accomplish much the same thing either by officially adopting a 'spring weekend' rationale for the law, in place of the governor's proclamation of a state religious holiday, or by moving to a system of local option for school districts." *Metzl v. Leininger*, 57 F.3d 618, 623-24 (7th Cir. 1995).

If a unit of government's past unconstitutional conduct forever taints its actions in the future, we would not have advised the defendants in *Adland*, 307 F.3d 471, that they

could cure the constitutional defects in their Ten Commandments display by changing its composition.

> While we cannot pass on the merits of plaintiffs' proposals [to amend the display], we are nevertheless confident that with careful planning and deliberation, and perhaps consultation with the plaintiffs, *the Commonwealth can permissibly display the [Ten Commandments] monument in question.*

Id. at 490 (emphasis added).

Our sister circuits have likewise rejected the idea that a prior unconstitutional display forever taints a subsequent display as religious. In *ACLU v. Schundler*, 168 F.3d 92 (3d Cir. 1999), the Third Circuit approved a city's Christmas display that had been modified in response to an Establishment Clause challenge:

> The mere fact that Jersey City's first display was held to violate the Establishment Clause is plainly insufficient to show that the second display lacked a secular legislative purpose, or that it was intend[ed] to convey a message of endorsement or disapproval of religion.

Id. at 105 (internal quotation marks and citations omitted). In fact, in *Books*, 235 F.3d 292, the Seventh Circuit actually imposed on the defendant an affirmative duty to modify an unconstitutional display:

> [T]he district court must ensure that, although the condition that offends the Constitution is eliminated,

> [the city] retains the authority to make decisions regarding the placement of the monument. *In making those decisions, [the city] has the right and, indeed, the obligation to take into consideration the religious sensibilities of its people and to accommodate that aspect of its citizens' lives in any way that does not offend the strictures of the Establishment Clause.*

Id. at 307 (emphasis added).

The U.S. Supreme Court's holding in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), did not overrule these cases; nor does it require us to find that the defendants' displays are unconstitutional merely due to some past constitutional violation. In *Santa Fe*, the plaintiffs challenged a school district practice that permitted students to deliver invocations and benedictions at graduation ceremonies and football games through the elected office of student council chaplain. In response, the defendants modified their policy in order to permit students, "with the advice and counsel of the senior class principal" to decide by vote whether to have an invocation at graduation. *Id.* at 296 (internal quotation marks and citation omitted). Later, the District drafted another policy entitled "Prayer at Football Games" that permitted students to decide whether to have an invocation at football games. *Id.* at 297. The final iteration of the policy, the "October policy," permitted students to vote whether they wanted to have a student-led "invocation and/or message" at football games, and, if so, who should give the invocation or message. *Id.* at 298 & n.6. It was the October policy that was at issue in *Santa Fe.*

Significantly, the Court announced its holding by stating

that "the text of the October policy alone reveals that it has an unconstitutional purpose." *Id.* at 314 (emphasis added). Thus, while the Court discussed the evolution of the District's prayer policy, *see id.* at 315, it expressly limited its holding to "[t]he narrow question . . . [of] whether implementation of the October policy insulates the continuation of such prayers from constitutional scrutiny." *Id.* At most, *Santa Fe* held that a modified policy, or display, cannot be used as a shield to prevent litigation. However, *Santa Fe* does not state that a history of unconstitutional displays can be used as a sword to strike down an otherwise constitutional display.

Based on the record before us, there is abundant evidence to conclude that the defendants' declared purposes for erecting these displays were primarily secular, a complete lack of evidence that their purpose was primarily religious, and, therefore, no evidence whatever that the defendants' declared purposes constitute a hoax or fraud upon this court. I conclude that the defendants' displays do not violate the first prong of the *Lemon* test.

B.

The second element of the *Lemon* test, as modified in *Lynch*, is whether a reasonable observer would believe that the challenged government action constitutes an "endorsement" of religion. *Lynch*, 465 U.S. at 691-94 (O'Connor, J., concurring). Incidentally, the opinions of my brother, Judge Clay, on this issue, are his own and do not represent those of the majority of the panel.

The first thing that must be said about the *Lemon* endorsement test, is that it asks whether a "reasonable

observer"—not a proselytizing religious zealot committed to the establishment of a state religion, or, on the other hand, an indefatigable professional litigant dedicated, in the name of civil liberty, to expunging God, religion, and all reference to religion from the public square—would understand these displays as having a primarily religious purpose and the principal or primary effect of endorsing religion.

As it did with respect to the secular purpose issue, Justice O'Connor's concurrence in *Lynch* "provides a sound analytical framework for evaluating governmental use of religious symbols" to decide the endorsement issue. *Allegheny*, 492 U.S. at 595. *Lynch*, the reader will recall, upheld a Christmas display that included a crèche, a Santa Claus house, reindeer, clowns, an elephant, a teddy bear, colored lights, and a sign bearing the phrase "Seasons Greetings." *Lynch*, 465 U.S. at 671. Justice O'Connor concluded that although the crèche was an inherently religious symbol, a reasonable observer would not view the overall display as an endorsement of religion:

> Although the religious and indeed sectarian significance of the crèche, as the District Court found, is not neutralized by the setting, the overall holiday setting changes what viewers may fairly understand to be the purpose of the display—as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content.

Id. at 692 (O'Connor, J., concurring).

Justice O'Connor cited "legislative prayers . . . ,

government declaration of Thanksgiving as a public holiday, printing of 'In God We Trust' on coins, and opening court sessions with 'God save the United States and this honorable court,'" as examples of "government acknowledgments of religion" rather than endorsements of it. *Id.* at 693 (internal citations omitted). She stated: "[The] history and ubiquity [of] those practices are not understood as conveying government approval of particular religious beliefs." *Id.* They

> serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.

Id.

The Supreme Court returned to the issue of government use of religious symbols and the endorsement issue in *Allegheny*, when it considered the legality of two separate holiday displays. The Court held that the first display, a crèche that stood alone in a prominent location inside the county courthouse, violated the Establishment Clause because "nothing in the context of the display detracts from the crèche's religious message." *Allegheny*, 492 U.S. at 598. The Court found it significant that, unlike the crèche in *Lynch*, the Allegheny County crèche was not accompanied by other secular symbols of Christmas. However, the Court approved the second challenged display—a Christmas tree, a menorah, and a sign entitled "Salute to Liberty"—which was located at the city-county building. Justice Blackmun concluded that the second display, in which a religious symbol, the menorah, stood alongside two secular symbols, the Christmas tree and

the sign, would not be perceived by the reasonable observer as an endorsement of religion: "[F]or purposes of the Establishment Clause, the city's *overall* display must be understood as conveying the city's secular recognition of different traditions for celebrating the winter-holiday season." *Id.* at 620 (Blackmun, J., concurring) (emphasis added).

Applying the analysis from *Lynch* and *Allegheny*, this court in *Adland* found that a reasonable observer would perceive a six-foot granite monument of the Ten Commandments as an endorsement of religion and that nothing in the overall display, which included a clock and several small plaques, reduced or diluted this message of endorsement. The court said it came to that conclusion largely because the monument "physically dominate[d]" the display and "'dwarf[ed]' all the other memorials . . . in the vicinity." *Adland*, 307 F.3d at 487 (internal quotation marks and citation omitted). But we explicitly left the door open for the possibility that some other display that included the Ten Commandments, in addition to secular articles, might pass the Lemon endorsement test if the overall display conveyed "an easily discernible, unified theme to a reasonable observer." *Id.* at 488.

> Without a unifying theme to hold the display together, a reasonable observer could only view the monuments separately. If a reasonable observer views the monuments separately, unconnected by a common context, his or her attention is naturally drawn to the Ten Commandments monument, the largest monument in the display, and its accompanying religious message.

Id.

But that is not this case. Here, the exhibition of ten documents, one religious and the rest secular, all of identical size, none having a position of prominence greater than another, and the whole labeled as contributing to "the foundation of American Law and Government," possesses a "unifying theme" that "hold[s] the display together" and conveys a single secular message that is spelled out in each display. No reasonable observer would ignore the nine secular documents in the display, including the one explicitly declaring the secular purpose for the display, and focus exclusively on the single religious document in order to conclude that the display is an endorsement of religion.

Just like the menorah, the Christmas tree, and the "Salute to Liberty" sign in *Allegheny*, and the crèche, the reindeer, the Santa Claus house, and related secular paraphernalia in *Lynch*, and in each display in this case, it is the documents in their totality that comprise the defendants' displays. Therefore, it is the documents in their totality, their unifying theme, that must be assessed to determine whether a reasonable observer would see them as having the "principal or primary effect" of endorsing religion.

My colleague rejects as "transparent" the defendants' "attempt to 'secularize' the displays by surrounding the Ten Commandments with other patriotic documents and symbols." Maj. op. at 39. Thus, contrary to the directives of the Supreme Court on this issue, my colleague refuses to evaluate the displays in their totality, including the statement of educational purpose that is part of each display, but instead focuses exclusively on the single framed copy of the Ten

Commandments and the history of the defendants' repeated efforts to assemble a display that would satisfy even federal judges.

My colleague makes much of the fact that the Ten Commandments have a "'religious nature.'" Maj. op. at 38 (quoting *McCreary II*, 145 F. Supp. 2d at 851). This indisputable characterization of the Ten Commandments, however, has nothing to do with the issue of our endorsement inquiry, which asks "'what viewers may fairly understand to be the purpose of the display.'" *Allegheny*, 492 U.S. at 595 (emphasis added) (quoting *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring)). In both *Lynch* and *Allegheny*, the Supreme Court approved of displays that contained inherently religious, even sectarian, symbols: the crèche and the menorah. The crucial fact of both of those cases was not that the symbols were religious, but that they were accompanied by secular symbols that, taken together, conveyed no message of endorsement. *See Lynch*, 465 U.S. at 679-81; *Allegheny*, 492 U.S. at 613-14. By focusing on the religious aspect of only one part of the defendants' displays, my colleague conducts precisely the same analysis that the Supreme Court rejected in *Lynch*:

> The District Court plainly erred by focusing almost exclusively on the crèche. When viewed in the proper context of the Christmas Holiday season, it is apparent that, on this record, there is insufficient evidence to establish that the inclusion of the crèche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message. In a pluralistic society a variety of motives and purposes are implicated.

Lynch, 465 U.S. at 680. My colleague's error may be summed up as follows: "Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Id.*

In concluding that a reasonable observer would understand these displays, in their totality, as conveying a message of endorsement of religion, because of the religious "taint" imparted by the Ten Commandments, my colleague attributes to reasonable observers an utter lack of common sense, a profound ignorance of American history, and, arguably, an outright hostility to religion in our nation's public life. In my judgment, no reasonable observer, gazing at these displays in McCreary, Pulaski, and Harlan counties could fail to appreciate what, apparently, my colleague does not: that from the founding of the republic, religion was and always has been, an inherent component of the law and culture of our pluralistic society, and that saying so in the public square acknowledges religion, but does not endorse it.

The Supreme Court itself has declared that "religion has been closely identified with our history and government." *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 212 (1963). It is uncontested that depictions of the Ten Commandments and Moses appear in secular context in, among other places, the United States House chamber, the entrance to the national archives, and in three separate locations in the United States Supreme Court, as well as numerous courtrooms and legal settings across the country.

The history and ubiquity of the Ten Commandments in public buildings throughout the country and the universal practice of courts and legislatures publicly invoking God's

blessing and guidance each day, before beginning the public's business, confirm the obvious: The inclusion of the Ten Commandments in these displays did nothing more than acknowledge the indisputable historical role of religion, and especially the canons of the Decalogue, as one of many principles, ideas, values, and impulses that, taken together, influenced the founders of this republic in shaping our law and government. Indeed, to have omitted the Ten Commandments from the collage of documents the defendants labeled "part of the foundations of American Law and Government," would have been historically inaccurate. No reasonable observer would consider the defendants' displays to have the "principal or primary effect" of endorsing religion.

V.

My colleagues' reasoning and conclusions are faithful neither to the language and meaning of the Establishment Clause nor to the Supreme Court's interpretation of it. What the Supreme Court said about the Christmas display in *Lynch* is perfectly applicable to the historical document displays in this case:

> The Court has acknowledged that the fears and political problems that gave rise to the Religion Clauses in the 18th century are of far less concern today. We are unable to perceive the Archbishop of Canterbury, the Bishop of Rome, or other powerful religious leaders behind every public acknowledgment of the religious heritage long officially recognized by the three constitutional branches of government. Any notion that these symbols pose a real danger of

> establishment of a state church is far-fetched indeed.

Lynch, 465 U.S. at 686 (internal quotation marks and citations omitted) (emphasis added).

The district court erred in the legal analysis it applied and clearly erred in its findings of fact in holding that these displays violate the Establishment Clause. Therefore, it also erred in its conclusion that the plaintiffs have a likelihood of success on the merits of their claim, and perforce, abused its discretion in issuing its preliminary injunction.

I would reverse the district court's judgment and set aside the preliminary injunction.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION

CIVIL ACTION NO. 99-507

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, et al.,
PLAINTIFFS,
vs.
McCREARY COUNTY, KENTUCKY, et al.
DEFENDANTS.

ORDER

COFFMAN, District Judge.

This matter is before the court upon the plaintiffs' motion (Record No. 40) for a supplemental preliminary injunction. The court, having reviewed the record and being otherwise sufficiently advised, will grant the motion and enjoin the continued exhibition of the current displays.

Facts

This consolidated case involves the efforts of McCreary and Pulaski Counties and the Harlan County schools to post the Ten Commandments. Having evolved throughout this litigation, the displays at issue originally consisted of only a

framed copy of the Ten Commandments. After several other documents were added, this court found that the amended displays[1] failed the "purpose" and "effect" prongs of the three-part test set out in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971),[2] in that they lacked a secular purpose[3] and had the effect of endorsing religion. *ACLU of Ky. v. McCreary County*, 96 F.Supp.2d 679, 689 (E.D.Ky.2000). Accordingly, this court ordered the immediate removal of the displays from the courthouses and school system.

The defendants then erected a third set of displays which

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[1] While they varied as to content, all three amended displays were held unconstitutional by this court, which found that "[w]hile some of the documents [were] displayed in their entirety, the defendants ha[d] excerpted a small portion of others to include only that document's reference to God or the Bible with little or no surrounding text." *ACLU of Ky. v. McCreary County*, 96 F.Supp.2d 679, 684 (E.D.Ky.2000).

[2] Under the *Lemon* test, (1) the government action must have a secular purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) the action must not result in "excessive governmental entanglement with religion." *Lemon*, 403 U.S. at 612-13, 91 S.Ct. 2105.

[3] This court found that the display's history and composition evinced no secular purpose. Though the government's stated purpose is entitled to some deference, the court held that its task was to "examine the actual purpose of the use of the religious objects and ... not blindly accept an allegedly secular purpose which is contrary to the facts of the case." *McCreary County*, 96 F.Supp.2d at 687.

also included the Ten Commandments. Those displays, entitled "The Foundations of American Law and Government Display," included the full text of the Magna Carta as enacted in 1215 A.D., the Declaration of Independence, the Bill of Rights of the Constitution of the United States, the Star Spangled Banner, the Ten Commandments with a Biblical citation, and the Mayflower Compact of 1620; a picture of Lady Justice and an explanation of its significance; the National Motto of the United States ("In God We Trust") emblem and the Preamble to the Kentucky Constitution; and an explanation of each of the documents' historical and legal significance.[4]

After the hearing on this motion and resulting settlement negotiations, the McCreary and Pulaski County displays were again modified; the Scripture reference of "Exodus 20:3-17" and the phrase "King James Version" were eliminated from the Ten Commandments document. The Harlan County School Board display remains as it existed at the time of the hearing, but the school board has adopted a "Historical Document Placement Procedure" which implements its resolution for posting historical documents.

The plaintiffs, having asked this court to expand the

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[4] The display in the Harlan County schools differed only in that it replaced the picture of Lady Justice with the text of Ky. Rev. St. § 158.195 (allowing posting of documents), the Ten Commandments document was a page from the Congressional Record declaring 1983 the year of the Bible (which contains a copy of the Ten Commandments), and that the explanation posted was in the form of a resolution of the Harlan County School Board.

preliminary injunction to include the current display,[5] must establish: (1) a strong or substantial likelihood of success on the merits; (2) that they will suffer irreparable harm in the absence of an injunction; (3) that others will not suffer substantial harm if the injunction is granted; and (4) that an injunction will serve the public interest. *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir.1998). Because the parties focus on the first of these elements and confine their arguments to the "purpose" and "effect" prongs of the *Lemon* test, the court will concentrate on these aspects of the issue. The court's analysis is governed by *Stone v. Graham*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980), and *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir.2000).[6]

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[5] Although the plaintiffs' motion actually challenged the third set of displays, this ruling encompasses both the third and fourth sets of displays.

[6] *Stone* is the only U.S. Supreme Court case on point and *Books* is the only circuit-court case which directly confronts the instant issue and which has not been called into question. The court takes note of the Supreme Court's recent denial of certiorari in *Books*, which was marked by dissent. *See City of Elkhart v. Books*, 532 U.S. 1058, 121 S.Ct. 2209, 149 L.Ed.2d 1036 (2001). Additionally, the court is aware that *Anderson v. Salt Lake City Corporation*, 475 F.2d 29 (10th Cir.1973) (*cert. denied*, 414 U.S. 879, 94 S.Ct. 50, 38 L.Ed.2d 124 (1973)), is a court-of-appeals case which reviewed the constitutionality of a Ten Commandments monument in light of the Establishment Clause; *Anderson*, however, predated *Stone*, and the Tenth Circuit has acknowledged that *Stone* undermines *Anderson's* continuing validity. *See Summum v. Callaghan*, 130 F.3d 906, 913 n. 8 (10th Cir.1997). While a number of other circuit-court cases involve challenges to Ten Commandments displays, they fail to address substantively the

Analysis

As *Stone* and *Books* direct, the test used to determine the constitutionality of the current display is that set out in *Lemon v. Kurtzman*, *supra*. Therefore, we look for the display to have a secular purpose, for its principal or primary effect (as seen by the reasonably well- informed observer) neither to advance nor inhibit religion, and for a lack of excessive entanglement.[7]

Purpose

Although the Supreme Court typically gives deference, in religion cases, to the government's articulated purpose, where the Ten Commandments are at issue the Court has rejected

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Establishment Clause issue. *See, e.g., DiLoreto v. Downey Unified School Dist. Bd. of Educ.*, 196 F.3d 958 (9th Cir.1999) (*cert. denied*, 529 U.S. 1067, 120 S.Ct. 1674, 146 L.Ed.2d 483 (2000)); *Zichko v. Clegg*, 162 F.3d 1171 (9th Cir.1998) (*cert. denied*, 526 U.S. 1162, 119 S.Ct. 2055, 144 L.Ed.2d 221 (1999)) (unpublished); *Suhre v. Haywood County*, 131 F.3d 1083 (4th Cir.1997); *Summum v. Callaghan*, 130 F.3d 906 (10th Cir.1997); *Freedom From Religion Foundation v. Zielke*, 845 F.2d 1463 (7th Cir.1988).

[7] In recent jurisprudence, the latter two elements of the *Lemon* test, see note 2, *supra*, have been collapsed into the question of whether the display is viewed as government endorsement of religion. The "endorsement" test is treated as a refinement of *Lemon*. *See Lynch v. Donnelly*, 465 U.S. 668, 690, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (O'Connor, J., concurring); *Granzeier v. Middleton*, 173 F.3d 568, 573 (6th Cir.1999); *Adland v. Russ*, 107 F.Supp.2d 782, 785 (E.D.Ky.2000).

the proffered purpose and found instead that the document is a sacred text which has a religious purpose. *See Stone v. Graham*, 449 U.S. 39, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980).[8] The government must dilute this religious purpose if a truly secular purpose can be said to exist. *See Books*, 235 F.3d at 303. This rejection of stated purpose has occurred even when secular symbols were used in conjunction with the Ten Commandments,[9] just as this court must reject the stated purpose even when the defendants place the Ten Commandments in a display with secular documents.

With regard to the current displays, the defendants have articulated a number of purportedly secular purposes. Their stated intentions include: (1) "[T]o erect a display containing the Ten Commandments that is constitutional"[10]; (2) "to demonstrate that the Ten Commandments were part of the

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[8] While not an explicit rejection of such an articulation, the Supreme Court declined to grant certiorari in *Books*, 532 U.S. 1058, 121 S.Ct. 2209, 149 L.Ed.2d 1039 (2001), where the Seventh Circuit had similarly rejected the city's stated purpose. *See Books*, 235 F.3d at 303-04 ("we hold that the City of Elkhart's avowed secular purpose of recognizing the historical and cultural significance of the Ten Commandments 'is not sufficient to avoid conflict with the First Amendment' " (quoting *Stone*, 449 U.S. at 41, 101 S.Ct. 192)).

[9] *See Books*, 235 F.3d at 296 (monument included an "all-seeing eye" and an American eagle grasping the American flag).

[10] Record No. 44, pp. 3, 4.

foundation of American Law and Government"[11]; (3) "[to include the Ten Commandments] as part of the display for their significance in providing 'the moral background of the Declaration of Independence and the foundation of our legal tradition'"[12]; (4) "to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government"[13]; and (5) [as stated by the Harlan County School Board] "to create a limited public forum on designated walls within the school district for the purpose of posting historical documents which played a significant role in the development, origins or foundations of American or Kentucky law...."[14] While these stated purposes are to be given some deference, "it is nonetheless the duty of the courts to 'distinguis[h] a sham secular purpose from a sincere one.' " *Santa Fe Ind. Sch. Dist. v. Doe*, 530 U.S. 290, 308, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 75, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985) (O'Connor, J., concurring in judgment)). Our task is made easier by the fact that the first three of these purposes are, on their face, religious in nature and therefore impermissible, while the history of the display belies the secular intentions of the other two.

Viewed facially, the first three of the defendants' stated

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[11] Record No. 44, p. 10.

[12] Record No. 44, p. 15 (quoting the explanation of the Ten Commandments placed near the display).

[13] Record No. 44, p. 13.

[14] Record No. 56, exh. B.

"secular" purposes run afoul of the Supreme Court's holding in *Stone v. Graham*, because that case established that a state's desire to proclaim the Ten Commandments' foundational value for American law and government is a religious, rather than secular, purpose. In *Stone*, the Commonwealth of Kentucky sought to post the Ten Commandments along with the following notation: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." *Stone*, 449 U.S. at 41, 101 S.Ct. 192. This putatively secular purpose, which is fundamentally the same as the defendants' first three articulated purposes, was rejected by the Court. The majority declared that "such an 'avowed' secular purpose is not sufficient to avoid conflict with the First Amendment.... The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact." *Id.*[15]

The defendants' latter two articulated purposes, while facially secular in that they do not single out the Ten

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[15] It bears emphasis that this court is not commenting on the truth of the defendants' assertion of the Ten Commandments as a "foundational document." Like the Seventh Circuit, we recognize that "[t]he text of the Ten Commandments no doubt has played a role in the secular development of our society and can no doubt be presented by the government as playing such a role in our civic order." *Books*, 235 F.3d at 302 (noting the frieze on the wall of the U.S. Supreme Court, which depicts Moses holding the Ten Commandments, along with other religious and non-religious lawgivers).

Commandments, crumble nonetheless upon an examination of the history of this litigation. "The Supreme Court has stressed the importance of the context of a clearly religious symbol in determining whether the purpose in displaying the symbol is religious or secular." *Books*, 235 F.3d at 303. To determine this context, the Seventh Circuit examined the history of the city's involvement in the monument's placement, from the initial dedication ceremony[16] to the city's adoption of a resolution in response to the then-pending litigation,[17] concluding that the city's purpose for displaying the monument was not secular. *See id.* at 304. In the present case, the history of these displays indicates that the

[16] The court found that the remarks of the speakers at the monument's dedication--a Catholic priest, a Jewish rabbi, and a Protestant minister--showed that "the purpose for displaying the monument was not only to provide youths with a common code of conduct to guide their participation in the civil community but also to urge the people of Elkhart to embrace the specific religious code of conduct taught in the Ten Commandments." *Books*, 235 F.3d at 303. Thus, the circumstances accompanying the monument's display emphasized the "inherently religious nature of the Ten Commandments." *Id.*

[17] In a manner similar to that of the instant defendants, the *Books* resolution characterized the monument and its symbols as acknowledging the Ten Commandments' historical and cultural significance, specifically the Commandments' effect on "the development of the fundamental legal principles of Western Civilization." *See Books*, 235 F.3d at 297. The court, however, looking to precedent, concluded that the resolution "ought to be accorded no more weight than the avowed secular legislative purpose articulated by the Kentucky legislature in Stone." *Id.* at 304.

defendants' overall purpose is religious in nature: to display the Ten Commandments. It is significant that the first displays, containing only the Ten Commandments, were erected in violation of the Supreme Court's clear ruling in *Stone*.[18] This defiance imprinted the defendants' purpose, from the beginning, with an unconstitutional taint observed not only by this court, but by anyone acquainted with this litigation.[19] The second set of displays (the subject of this

[18] The *Stone* court did not hinge its ruling upon the mandatory nature of the statute requiring schools to post the Ten Commandments; rather, it emphasized the message sent by the posting of a lone religious text, noting that "[t]his is not a case in which the Ten Commandments are integrated into the school curriculum ...." *Stone*, 449 U.S. at 42, 101 S.Ct. 192.

[19] This case is distinguishable from the situation in *ACLU of New Jersey v. Schundler*, 168 F.3d 92 (3rd Cir.1999), where the Third Circuit rejected the argument that the government's initial holiday display and subsequent modifications could be regarded as evidence of the official's bad faith because

> the Supreme Court's decisions regarding holiday displays have been marked by fine line-drawing, and therefore it is not easy to determine whether particular displays satisfy the Court's standards. Under these circumstances, the mere fact that city officials miscalculate and approve a display that is found by the federal courts to cross over the line is hardly proof of the officials' bad faith. Although the original Jersey City display was ultimately struck down, no Supreme Court or Third Circuit precedent clearly established that it was unconstitutional until the prior panel handed down its decision, and therefore the city officials'

court's previous ruling) accentuated the defendants' religious purpose, rather than diminishing it, by posting the Commandments along with "specific references to Christianity and texts that, while promulgated by the federal government, were chosen solely for their religious references." *ACLU of Ky. v. Pulaski County*, 96 F.Supp.2d 691, 699 (E.D.Ky.2000).

In their third and fourth attempts, the defendants have posted the Ten Commandments alongside the full text of various historical documents, purporting to educate the citizens of McCreary and Pulaski Counties and the schoolchildren of Harlan County regarding the history of this nation's law and government. It is this court's function to determine " 'whether the government's actual purpose is to endorse or disapprove of religion,' " *Books*, 235 F.3d at 302

> decision to erect that display, which had been put up for decades, can hardly be viewed as evidence of an intent to flout the Establishment Clause.

Id. at 105 (footnotes omitted). In contrast, Supreme Court precedent regarding the posting of the Ten Commandments--*Stone v. Graham*--has not been marked by "fine line-drawing," nor was the counties' initial Ten Commandments display the product of "miscalculation." The initial display was in blatant disregard of a long-standing Supreme Court opinion clearly establishing its unconstitutionality. That fact, coupled with the even more overtly religious second display, in which the defendants selected only religious portions from historical American documents, lends credence to this court's determination of the defendants' religious purpose in this case.

(quoting *Edwards v. Aguillard*, 482 U.S. 578, 585, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987) (emphasis added)), a function we undertake by evaluating the totality of the circumstances. *See id.* In light of the history of the government's involvement in these displays, the defendants' purpose is clear. This purpose--posting the Ten Commandments--is improper and violative of the Establishment Clause "because it sends the ancillary message to ... nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'" *Id.* at 309-10 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (O'Connor, J., concurring)). Thus, the defendants' fourth and fifth articulated purposes do not fundamentally differ from their first three, and do not suffice to show that the government is motivated by a secular purpose in posting the current displays. Accordingly, the current displays fail the first prong of the *Lemon* test, in that they lack a secular purpose.

Effect

While failure of any prong of *Lemon* results in an Establishment Clause violation, this court will complete its analysis by considering the effect of the current displays. The second prong of *Lemon* is met when a government action's "principal or primary effect ... neither advances nor inhibits religion." *Lemon*, 403 U.S. at 612, 91 S.Ct. 2105. The "effect" prong has more recently been articulated as the endorsement test, which "prohibits speech that a reasonable observer would think is an endorsement of religion by the government." *Granzeier v. Middleton*, 173 F.3d 568, 573 (6th Cir.1999); *see also* note 7, *supra*. To make this determination,

the court must look at the "totality of the circumstances surrounding the display." *Books*, 235 F.3d at 304. Moreover, the "reasonable observer" is considered to be one who is "familiar with the history and placement" of the display, rather than one who sees it with no prior knowledge.[20] In the case at bar, the composition, setting, and history of the current displays would lead a reasonable observer to interpret them as the county governments' endorsement of religion.

The composition of the current set of displays accentuates the religious nature of the Ten Commandments by placing them alongside American[21] historical documents. Given the

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[20] *Books*, 235 F.3d at 306. *See also Santa Fe Ind. Sch. Dist.*, 530 U.S. at 308, 120 S.Ct. 2266 ("In cases involving state participation in a religious activity, one of the relevant questions is 'whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools.' ") (quoting *Wallace v. Jaffree*, 472 U.S. 38, 73, 76, 105 S.Ct. 2479, 86 L.Ed.2d 29 (O'Connor, concurring in judgment)).

[21] The Magna Carta and the picture of Lady Justice are the exceptions here, the only documents (besides the Ten Commandments) which are not unique to American history. Their inclusion, however, does not sufficiently broaden the display to encompass "world history" or to make it a survey of various civilizations' legal codes, so as to dilute the uniquely religious message of the Ten Commandments.

religious nature of this document,[22] placing it among these patriotic and political documents, with no other religious symbols or moral codes of any kind, imbues it with a national significance constituting endorsement. The Ten Commandments are completely different from the remainder of the displays. The reasonable observer will see one religious code placed alongside eight political or patriotic documents, and will understand that the counties promote that one religious code as being on a par with our nation's most cherished secular symbols and documents. This is endorsement. The Seventh Circuit has adopted similar reasoning; when considering the effect of a Ten Commandments monument, the *Books* court found that "the placement of the American Eagle gripping the national colors at the top of the monument hardly detracts from the message of endorsement; rather, it specifically links religion ... and civil government." *Books*, 235 F.3d at 307. The counties have not, despite their avowed efforts, erected the type of

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[22] *Stone* recognized that:

> The Ten Commandments are undeniable a sacred text in the Jewish and Christian faiths .... [which] do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day.

Stone, 449 U.S. at 41-42, 101 S.Ct. 192 (citations omitted).

"appropriate educational display" which might "try to include all the various moral, historical, and political influences on our legal system' such as the Code of Hammurabi, the Code of Justinian, and passages from early English cases." *Harvey v. Cobb County*, 811 F.Supp. 669, 678 (N.D.Ga.1993). Instead, the current set of displays conveys the counties' comment on the Ten Commandments' (and consequently, religion's) foundational value to our shared history as citizens; a reasonable person would perceive this message as endorsement.

Furthermore, the setting of these displays--in the McCreary and Pulaski County courthouses and in the Harlan County public schools--has the effect of advancing religion. The courthouse displays are posted at the seat of government, which " 'is so plainly under government ownership and control' that every display on its property is marked implicitly with government approval." *Books*, 235 F.3d at 306 (quoting *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 128 (7th Cir.1987)).[23] *Stone* confirms that this observation

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[23] The court also noted that:

> In fulfilling our responsibility to apply faithfully the Establishment Clause jurisprudence of the Supreme Court of the United States, we have subjected to particularly careful scrutiny displays at the seat of government. We have taken this course because "[a]n important concern of the effects test is ... 'whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, or their individual religious choices.'"

Books, 235 F.3d at 305 (quoting *American Jewish Congress*, 827 F.2d at 127).

extends to the public school setting.[24] Like the monument in *Books*, the current set of displays conveys a message of endorsement, despite the inclusion of secular documents and symbols. The fact that this religious message is exhibited within public places of great importance, such as the seat of government and the public schools, heightens the effect of advancing religion and the consequent violation of the Establishment Clause.

Finally, the history of these displays bolsters the reasonable observer's perception of the state endorsement of religion. The reasonable observer viewing these displays would know of the defendants' previous attempts to post the Ten Commandments alone and surrounded by religious excerpts from historical documents. Even without this specific knowledge, a reasonable observer must be charged with knowing something of the controversy surrounding these displays, which has focused on only one of the nine framed documents: the Ten Commandments. The defendants' non-secular purpose would be known to such a viewer and

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[24] "If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause." *Stone*, 449 U.S. at 42, 101 S.Ct. 192.

would increase the displays' religious effect by conveying the message that the counties had succeeded not in posting a display of "The Foundations of American Law and Government," but in posting the Ten Commandments. Thus, these displays likewise fail the "effect" prong of the Lemon test.

Conclusion

The Supreme Court has recognized two constitutionally permissible uses of the Ten Commandments within the public arena. The first is where "the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." *Stone*, 449 U.S. at 42, 101 S.Ct. 192 (citing *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 225, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963)). The second is in a display incorporating both religious and secular figures, "signal[ing] respect not for great proselytizers but for great lawgivers,"[25] such as the frieze on the wall of the United States Supreme Court.[26] The first use

[25] *County of Allegheny v. ACLU*, 492 U.S. 573, 652-53, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989) (Stevens, J., concurring in part and dissenting in part).

[26] The frieze on the south wall of the Court depicts Moses holding the Ten Commandments, along with Menes, Hammurabi, Solomon, Lycurgus, Solon, Draco, Confucius, Octavian, and the allegorical figures of Fame, Authority, Light of Wisdom, and History. The frieze on the north wall includes Justinian, Muhammad, Charlemagne, King John, Louis IX, Hugo Grotius, Sir William Blackstone, John Marshall, Napoleon, and the allegorical figures of Liberty and Peace, Right of Man, Equity, and

of the Ten Commandments has a teaching function and was suggested in a case involving a school,[27] while the second use has a legal-historical function and appears in a courtroom rather than a schoolhouse. Thus, these defendants have been given clear guidance by the United States Supreme Court for use of the Ten Commandments in their own venues.

At any rate, the current displays are clearly outside the bounds of these permissible uses and are violative of the Establishment Clause. Thus, the defendants have shown a strong or substantial likelihood of success on the merits. As the facts and analysis of the remaining three elements required for a preliminary injunction remains the same here as in our previous opinions in this case,[28] those elements are met and the injunction will be extended. Accordingly,

IT IS ORDERED that the plaintiff's motion to extend the preliminary injunction to the current displays is GRANTED.

IT IS FURTHER ORDERED that the displays shall be removed from the McCreary and Pulaski County courthouses and from the Harlan County schools IMMEDIATELY.

IT IS FURTHER ORDERED that the parties shall submit joint written status reports no later than July 23, 2001,

Philosophy. There are also friezes on the east and west walls.

[27] *See Stone*, 449 U.S. at 42, 101 S.Ct. 192.

[28] *See, e.g., McCreary County*, 96 F.Supp.2d at 690-91.

advising the court whether they wish this order to be the final judgment in this case.

This 22nd day of June 2001.

/s JENNIFER B. COFFMAN
Jennifer B. Coffman, Judge
United States District Court
Eastern District of Kentucky

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION

CIVIL ACTION NO. 99-507

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, et al.,
PLAINTIFFS,
vs.
McCREARY COUNTY, KENTUCKY, et al.
DEFENDANTS.

ORDER

COFFMAN, District Judge.

This matter, which presents a First Amendment challenge to a display of the Ten Commandments and other documents,[1]

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[1] The subject display originally included only the Ten Commandments. Because the court here concludes that later modification of the exhibit was merely a futile attempt to render constitutional the original Ten Commandments display, that alteration was analytically meaningless when measured by the Establishment Clause of the First Amendment. The court thus uses interchangeably the terms "Ten Commandments display," "religious display," "display of the Ten Commandments and other documents," and similar phrases to describe the exhibit here at

is before the court upon the plaintiffs' motion for a preliminary injunction and the defendants' motion to dismiss. This court held a hearing on April 20, 2000 and, having reviewed the arguments of counsel and being otherwise sufficiently advised, will grant the plaintiffs' motion for a preliminary injunction and will deny the defendants' motion to dismiss.[2]

Motion to Dismiss

For the reasons explained below, the plaintiffs have stated a claim for a First Amendment violation. The defendants also have raised two procedural grounds for their motion to dismiss, arguing that the plaintiffs lack standing to bring their claims and that they were ineffectually served.

The defendants contend that the plaintiffs lack standing to bring these actions because they have not alleged "injuries in fact." The injury-in-fact component of standing requires a plaintiff to have a personal stake in the matter to be adjudicated. *Lujan v. Defenders of Wildlife*, 504 U.S. 555,

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issue.

[2] This is one of three companion cases, simultaneously filed, which attack such displays. Any minimal variances among the three displays possess no legal significance for the purpose of the motions now pending before the court. Having observed that the case records also share similar complaints, memoranda, and motions and that the three cases share identical lead counsel on both sides, the court combined the three for oral argument and today enters virtually identical opinions--with necessary but slight factual variations--in all three.

560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The defendants correctly note that abstract or hypothetical injuries are insufficient. *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974). The plaintiffs in this lawsuit, however, have suffered and are under the threat of suffering concrete injuries.

In *Washegesic v. Bloomingdale Public Sch.*, 33 F.3d 679, 683 (6th Cir.1994), the court considered a challenge to a public school's display of a portrait of Jesus. A former student was determined to have standing because he would come into unwelcome direct contact with the display while visiting the school to attend sporting events or meet former teachers. *Id.* The court held that even a member of the PTA or of the public would have standing if she attended events in the school and "took the portrait as a serious insult to her religious sensibilities." *Id.* Like the plaintiff in that case, the plaintiffs here have standing because they must come into contact with the display of the Ten Commandments whenever they enter the courthouse to conduct business.

The defendants cite several Seventh Circuit cases holding that in order to have standing in an Establishment Clause challenge, a plaintiff must undertake a special burden or alter his or her normal routine to avoid the offensive object. In *Gonzales v. North Township of Lake County, Ind.*, 4 F.3d 1412 (7th Cir.1993), for example, the plaintiffs challenged the presence of a crucifix in their city's park. The plaintiffs' discontinued use of an area within the park conferred standing. *Id.* at 1417. Here, the plaintiffs have not specifically alleged that the display has forced them to alter their normal routines. The necessary alterations would be highly impractical, however, because they must enter the courthouse

to conduct civic business, and therefore the individual plaintiffs have met the standing requirement for their First Amendment claim.

The defendants' claim that the American Civil Liberties Union ("ACLU") lacks organizational standing likewise must be rejected. In *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977), the Supreme Court held:

> Even in the absence of injury to itself, an association may have standing solely as the representative of its members .... The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit .... So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.

Id. at 342, 97 S.Ct. 2434, quoting *Warth v. Seldin*, 422 U.S. 490, 511, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Here, the ACLU has members in McCreary County who would have standing for the same reason that the named plaintiffs have standing. Furthermore, this lawsuit will not require the individual participation of ACLU members. Thus, the ACLU has organizational standing.

The defendants next claim that they were not properly

served under Fed. R. Civ.P. 4. Rule 4(j)(2) provides that a county may be served "by serving the summons and complaint in the manner prescribed by law of that state for the service of summons." The Kentucky Rules of Civil Procedure allow a summons to be served by mail. Ky.R.Civ.P. 4.01(a). Under the Kentucky rule, the clerk of court actually mails the summons. Here, the plaintiffs placed the summons in the mail themselves, and the defendants argue that the service was ineffective because the clerk of court did not place the summons in the mail. The federal clerks of court do not, however, place summons in the mall for plaintiffs. The Federal Rules of Civil Procedure permit service "in the manner" allowed by their state counterparts--here, mailing. That the plaintiffs rather than a clerk of court mailed the summons does not render it ineffective. Accordingly, the defendants' motion to dismiss will be denied.

Preliminary Injunction

A preliminary injunction preserves the relative positions of the parties until a trial on the merits can be held. *Univ. of Texas v. Camenisch*, 451 U.S. 390, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981). To receive a preliminary injunction, a plaintiff must establish: (1) a strong or substantial likelihood of success on the merits; (2) that he or she will suffer irreparable harm in the absence of an injunction; (3) that others will not suffer substantial harm if the injunction is granted; and (4) that an injunction will serve the public interest. *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir.1998). These four factors guide the discretion of the court and are not unbending prerequisites. *Id.*

A party need not prove his case in full at a

preliminary-injunction hearing. *Camenisch*, 451 U.S. at 395, 101 S.Ct. 1830. The court must, however, make findings of fact and conclusions of law, which are not binding at a trial on the merits, *United States v. Owens*, 54 F.3d 271, 277 (6th Cir.1995), when deciding a motion for a preliminary injunction. The court need not make specific findings of fact regarding each of the four factors if fewer are dispositive. *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1076 (6th Cir.1994). In a case brought under the First Amendment, the likelihood of success on the merits frequently may be the determinative factor. *Connection Distrib.*, 154 F.3d at 288.

Findings of Fact

McCreary County officials recently erected in the McCreary County courthouse a Ten Commandments display, pursuant to an August 17, 1999 fiscal court order, signed by the defendant Jimmie Greene, that the display be posted in "a very high traffic area" of the courthouse. When this suit was filed, the display consisted of at least one framed copy of one version of the Ten Commandments and was not part of any larger educational, historical, or retrospective exhibit. After this lawsuit was filed, the defendants amended the display to include several other documents.[3] At oral argument, the defendants conceded that they did so in an attempt to bring

[3] The defendants argue that because they altered the display, the plaintiffs' complaint is moot. Their argument fails because the new display is effectively a continuation of the original display, and the plaintiffs raise the same objections to the amended display.

the display within the parameters of the First Amendment and to insulate themselves from suit. The display, both in its original form and as amended, is readily visible to the plaintiffs and the other county citizens who use the courthouse to conduct their civic business, to obtain or renew driver's licenses and permits, to register cars, to pay local taxes, and to register to vote.

As it now exists,[4] the display consists of (1) an excerpt from the Declaration of Independence; (2) the Preamble to the Constitution of Kentucky; (3) the national motto of "In God We Trust"; (4) a page from the Congressional Record of Wednesday, February 2, 1983, Vol. 129, No. 8, declaring it the Year of the Bible and including a copy of the Ten Commandments; (5) a proclamation by President Abraham Lincoln designating April 30, 1863 a National Day of Prayer and Humiliation; (6) an excerpt from President Lincoln's "Reply to Loyal Colored People of Baltimore upon Presentation of a Bible" reading, "The Bible is the best gift God has ever given to man."; (7) a proclamation by President Ronald Reagan marking 1983 the Year of the Bible; and (8) the Mayflower Compact. While some of the documents are

[4] At oral argument, it appeared that the original exhibit of the Ten Commandments was removed and replaced with the text of theCongressional Record which includes a copy of those Commandments. The exhibits attached to the defendants' brief, however, include a photograph of the Pulaski County Courthouse display in which the large framed copy of the Ten Commandments remains, with the other, smaller documents hanging to one side. For the purposes of this motion, either scenario produces the same result.

displayed in their entirety, the defendants have excerpted a small portion of others to include only that document's reference to God or the Bible with little or no surrounding text.

Conclusions of Law

1. Likelihood Of Success On The Merits

The plaintiffs seek injunctive and declaratory relief under 42 U.S.C. § 1983, arguing that the continued posting of the Ten Commandments in the McCreary County courthouse violates their First Amendment rights. Section 1983 creates a federal cause of action against any person who, acting under color of state law, deprives another of his federal rights. *See Conn v. Gabbert*, 526 U.S. 286, 290, 119 S.Ct. 1292, 143 L.Ed.2d 399 (1999). Section 1983 does not create separate substantive rights, but merely provides a method of vindicating independently conferred federal rights. *Albright v. Oliver*, 510 U.S. 266, 271, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994). A plaintiff must allege two elements to establish a prima facie case under § 1983:(1) that the action occurred "under color of law"; and (2) that the action was a deprivation of a constitutional right or a federal statutory right. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). In a § 1983 case brought against a defendant in his official capacity, the governmental entity is liable under § 1983 only when the entity itself is a "moving force" behind the deprivation; thus, in an official-capacity suit, the entity's policy or custom must have played a part in the violation of federal law. *Kentucky v. Graham*, 473 U.S. 159, 166, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985).

Here, the plaintiffs have shown a substantial likelihood of success on the merits for both elements required by a § 1983 claim. First, Jimmie Greene acted under color of state law [5] and in his capacity as County Judge Executive when he promulgated the August 17, 1999 Fiscal Court order requiring that the Ten Commandments be displayed in the courthouse. Greene possessed policy-making authority, so that his order to post the Ten Commandments constituted official McCreary County policy. That policy serves as a driving force behind the constitutional violations alleged in this case. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986).

Second, violations of the First Amendment such as those alleged in this case are remediable through a § 1983 claim. The First Amendment declares, "Congress shall make no law. respecting an establishment of religion...." U.S. Const. amend I. Pursuant to the Establishment Clause of the First Amendment, governmental bodies may not "take a position on questions of religious belief or [make] adherence to a religion relevant in any way to a person's standing in the

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[5] A § 1983 defendant acts under color of state law when he exercises power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *West v. Atkins*, 487 U.S. 42, 49, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988); *United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941). Indeed, Greene's activities must be subjected to First Amendment scrutiny because in hanging the Ten Commandments in the courthouse, he acted as a public, government official, not as a private citizen. *See County of Allegheny v. ACLU*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989).

political community." *County of Allegheny v. ACLU*, 492 U.S. 573, 594, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (O'Connor, J., concurring)). Government actions challenged under the Establishment Clause are reviewed under the three-part test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). Under *Lemon*, the governmental action first must have a secular purpose and "second, its principal or primary effect must be one that neither advances nor inhibits religion." Finally, the governmental action must not result in "excessive governmental entanglement with religion." *Id.* at 612-13, 91 S.Ct. 2105. In the past decade, the Supreme Court has reframed the *Lemon* analysis, focusing on whether either the purpose or the effect of the challenged governmental action results in the endorsement of religion. *Edwards v. Aguillard*, 482 U.S. 578, 585, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987). Courts in this circuit treat the endorsement test as a refinement or clarification of the *Lemon* analysis, *Granzeier v. Middleton*, 173 F.3d 568, 573 (6th Cir.1999), and this court will apply that test to decide whether the Ten Commandments display, both in its original form and as amended, passes constitutional muster.

The endorsement test forecloses governmental action that "a reasonable observer would think is an endorsement of religion by the government." *Id.* Justice O'Connor formulated the endorsement test, explaining:

> The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.

Lynch, 465 U.S. at 690, 104 S.Ct. 1355 (O'Connor, J., concurring).[6] In other words, the challenged conduct must have both an actual secular purpose and also the effect of neither advancing nor hindering religion. Because the government's use of a religious reference or of an object with religious meaning may be appropriate under some circumstances but not in others, the court must assess the constitutionality of government conduct with careful attention to the manner and context of the action. *Compare Allegheny*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472, with *Lynch*, 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (display of creche held unconstitutional in former but constitutional in latter).

The purpose prong of the endorsement analysis asks whether a secular purpose actually motivated the government's action.

> In considering the purpose prong ... the focus of the inquiry is on the intentions of the government. Namely, did the government intend to convey a message of endorsement or disapproval of religion when it implemented the challenged policy. Courts should generally be deferential to the government's

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[6] The endorsement test was adopted by a majority of the Court in *Allegheny*, 492 U.S. at 595, 109 S.Ct. 3086.

> articulation of a secular purpose. The government's secular purpose, however, must be sincere and not a mere sham. Although the government's purpose need not be exclusively secular, a practice will violate the Establishment Clause if it is entirely motivated by a purpose to advance religion.

Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 384 (6th Cir.1999), citing *Edwards v. Aguillard*, 482 U.S. 578, 585-86, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987); *Lynch*, 465 U.S. at 681 n. 6, 104 S.Ct. 1355; *Wallace v. Jaffree*, 472 U.S. 38, 56, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985). *See Granzeier*, 173 F.3d at 574. Here, the court will look to the County's proffered purpose, the brief history of the Ten Commandments display, and the display itself to determine whether the display serves an actual, secular purpose.

In its original form, the Ten Commandments display, consisting only of the Commandments unaccompanied by any other documents, lacks any secular purpose. The Ten Commandments are a distinctly religious document, believed by many Christians and Jews to be the direct and revealed word of God, and their very nature precludes a finding of a prevailingly secular purpose here. Indeed, "the pre-eminent purpose for posting the Ten Commandments ... is plainly religious in nature." *Stone v. Graham*, 449 U.S. 39, 41, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980).[7]

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[7] While the defendants suggest that *Stone* is inapplicable here because it dealt with legislative action and declared the posting of the Ten Commandments to be unconstitutional without the benefit of full briefing, it nevertheless is still good law and this court is bound by its precedential value. The court cites the case today merely to establish that the Ten Commandments are a distinctly religious text and that their posting has a religious purpose.

> The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. See Exodus 20:12-17; Deuteronomy 5:16-21. Rather, the first part of the Commandments concerns the religious duties of believers: worshiping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day. *See* Exodus 20:1-11; Deuteronomy 5:6-15.

Id. at 41-42, 101 S.Ct. 192. In their briefs and at oral argument, the defendants suggest that the Ten Commandments were posted in order to teach McCreary County residents about American religious history and the foundations of the modern state. The defendants also concede that the display purports to demonstrate America's Christian heritage.[8] The narrow scope of the display--a single religious

[8] Such an overtly Christian purpose violates the Establishment Clause. While the court recognizes that the Christian tradition has played an important role in American culture, the defendants' reliance on *Church of the Holy Trinity v. United States*, 143 U.S. 457, 12 S.Ct. 511, 36 L.Ed. 226 (1892), is misplaced. In that case, the Supreme Court examined whether a service contract between an incorporated church and a foreign minister fell within the purview of a statute regulating the import of foreign laborers. The Court's

text unaccompanied by any interpretation explaining its role as a foundational document--can hardly be said to present meaningfully the story of this country's religious traditions, and for this court to conclude that the original display had a secular purpose belies reason.

The challenged display now includes other documents which the defendants argue illustrate the display's secular purpose: the education of McCreary County residents concerning American religious history. As the Supreme Court has made abundantly clear in its articulation of the endorsement test, the court must examine the actual purpose of the use of the religious objects and should not blindly accept an allegedly secular purpose which is contrary to the facts of the case. Furthermore, the requirement of a secular purpose "is not satisfied ... by the mere existence of some secular purpose, however dominated by religious purposes." *Lynch*, 465 U.S. at 691, 104 S.Ct. 1355 (O'Connor, J., concurring). While the government's stated purpose may be entitled to some deference, the history of the display here and the choice of documents in the display contradict the County's assertion. That the display originally consisted solely of the Ten Commandments and that it was altered--albeit without any legally significant change--only after this lawsuit was filed weigh heavily against the finding of a secular purpose.

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analysis focused upon and delineated rules of statutory construction and did not entail First Amendment jurisprudence. Indeed, the language cited by the defendants is dicta and is neither that Court's ruling nor vital to its ruling.

Likewise, a review of the documents themselves forecloses a characterization of the purpose of the display as secular. The County narrowly tailored its selection of foundational documents to incorporate only those with specific references to Christianity and texts that, while promulgated by the federal government, were chosen solely for their religious references. The display does not appear to have been intended to educate McCreary County residents, in a balanced or accurate manner, about the traditions and texts that were drawn upon by this nation's founders or about the complex role religion has played in this country's history. In short, as shown by the facts of the case and the display itself, the exhibit--both in its original form and as altered--serves no secular purpose, nor was it ever intended to do so. As the display clearly lacks a secular purpose, it violates the First Amendment and the court's analysis need go no further. *See Wallace*, 472 U.S. at 56, 105 S.Ct. 2479. The court, however, will complete the *Lemon* analysis to determine whether the effect of the display also violates the Establishment Clause.

In determining such an effect, the court must ask whether an objective observer acquainted with the display would perceive it as a governmental endorsement of religion. *See ACLU v. Capitol Square Review and Advisory Bd.*, 210 F.3d 703 (6th Cir.2000). The objective-observer standard parallels the reasonable-person standard in torts law; the question is not whether one particular, uninformed, subjective observer would view the display as an endorsement of religion but whether an objective, reasonable, knowledgeable observer would do so. Here, the prevailing effect of the display is one of governmental endorsement of religion.

The overriding theme of each individual document as

presented in the display and of the display as a whole is one of religion and more specifically of Christianity. The first document is a copy of the Congressional Record from February 2, 1983, proclaiming that year the Year of the Bible and reflecting the remarks of Representative Phillip M. Crane about his personal beliefs concerning the importance of the Bible and the Ten Commandments, a version of which is included in the remarks. The next document consists of two brief excerpts: one from the Declaration of Independence, "All men ... are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness," and one from the Constitution of Kentucky, "We, the people of the Commonwealth of Kentucky, grateful to Almighty God for the civil, political and religious liberties we enjoy, and invoking the continuance of these blessings, do ordain and establish this Constitution." The next document is President Lincoln's Proclamation of a Day of Prayer. Issued in 1863, it confesses to God and seeks forgiveness for national sins committed during the Civil War. Another presidential proclamation follows, from President Reagan, declaring 1983 the Year of the Bible in honor of its influence in shaping America. A copy of the Mayflower Compact follows, in which the colony's founders invoke "the name of God" and explain that their journey was taken, among other reasons, "for the glory of God and advancement of the Christian faith." Finally, bearing a picture of Abraham Lincoln, the next states, "The Bible is the best gift God has ever given to man."

While a display of some of these documents may not have the effect of endorsing religion in another context, they collectively have the overwhelming effect of endorsing religion in the context of this display. No reasonable observer

of the display could conclude otherwise. Each and every document refers to religion. Several have been edited to include only their religious references. Indeed, the only unifying element among the documents is their reference to God, the Bible, or religion. Furthermore, the display lacks an explanation of the documents' historical significance or of the reasons for their references to religion. Removed from their historical context and placed with other documents with which the only common link is religion, the documents have the undeniable effect of endorsing religion.

The defendants argue that the display cannot be held to violate the First Amendment because it includes excerpts from texts which have been held to be constitutional despite references to God or religion. They point specifically to this nation's motto of "In God We Trust" and the phrase "one nation under God" found in the Pledge of Allegiance. The defendants' argument, however, fails. First, as to several of the documents, the defendants did not include the entire text or even a meaningful section of each text. Rather, they narrowly extracted only the sections directly mentioning God. This effectively changed the meaning and significance of each of the documents from the original, particularly when read in conjunction with the rest of the Ten Commandments display. Second, and more generally, in upholding examples of ceremonial deism, such as the phrase "In God We Trust," courts have pointed to the long-standing existence of such phrases as well as their non-sectarian nature, concluding that "a reasonable observer, aware of the purpose, context, and history of the phrase ..., would not consider its use ... to be an endorsement of religion." *ACLU v. Capitol Square Review and Advisory Bd.*, 210 F.3d at 721-22 (quoting *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir.1996)). *See*

Allegheny, 492 U.S. at 602-04, 109 S.Ct. 3086. Here, there is neither a long-standing tradition of posting the Ten Commandments in county courthouses nor any secular purpose for doing so. As the court has explained, a reasonable observer would conclude that the Ten Commandments display represents a governmental endorsement of religion, rather than merely a traditional manner of solemnizing a government meeting or giving a stamp of legitimacy to national currency. To the extent the defendants have invited this court to break with precedent and hold that the posting of the Ten Commandments should be viewed as only another example of ceremonial deism, the court declines to do so.

The defendants direct the court's attention to three cases in which other courts held Ten Commandments displays to be constitutional. All three of the cases are distinguishable from this case. In *Books v. City of Elkhart, Ind.*, 79 F.Supp.2d 979 (N.D.Ind.1999), the district court held that a fifty-eight-year-old stone monument containing, among other things, a copy of the Ten Commandments, did not violate the Establishment Clause. The monument was merely one of several historical and cultural plaques and memorials, all donated by private parties, standing on the edges of a city-owned lot, removed from government buildings. *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir.1973), considered an identical memorial, which it held to be constitutional. That opinion, however, has been called into question by the Tenth Circuit, which noted that it was decided before Stone and which commented that "more recent cases [cast] doubt on the validity of our conclusion that the Ten Commandments monolith is primarily secular in nature." *Summum v. Callaghan*, 130 F.3d 906, 910 n. 10 (10th Cir.1997)(decided on grounds of freedom of speech). Here,

the Ten Commandments display is not in an area with other memorials and is not incorporated as part of a larger, secular sculpture or display. Furthermore, the court's holding in *Elkhart* that the Ten Commandments should be considered to be secular is by no means definitive in light of the Supreme Court's holding in *Stone*, and the holding in *Elkhart* was largely dependent upon the manner in which the Commandments were displayed, differing greatly from the Ten Commandments display here.

Similarly, in *Suhre v. Haywood County, N.C.*, 55 F.Supp.2d 384 (W.D.N.C.1999), the court held that a granite frieze in a courthouse did not violate the Establishment Clause. That sculpture recounted the historical development of the law, with images of "the blind Goddess of Justice, now called Lady Justice[,] ... ancient gods and goddesses, and the laws of Rome and the Tribes of Israel." *Id.* at 386. On either side of Lady Justice, who bears the Scales of Justice in one hand and holds the Sword of Justice in another, were two marble plaques bearing the Ten Commandments. The court noted that the courthouse had been entered into the National Register of Historic Places by the United States Department of the Interior, with special note paid to the sculpture, which could not be removed without its destruction. The court held that the purpose in sculpting the frieze was to display artistically the history of ethics, civilization, and the law, and that when viewed as a whole the sculpture did not communicate a governmental endorsement of religion. Again, the Ten Commandments display challenged here is not part of some larger artistic rendering or academic display encompassing a wide range of cultural, religious, and legal traditions. Instead, it is a narrowly tailored display, intended to convey and having the effect of conveying a very specific

governmental endorsement of religion.

The First Amendment will not permit such an endorsement, as "it sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Allegheny*, 492 U.S. at 595, 109 S.Ct. 3086, quoting *Lynch*, 465 U.S. at 688, 104 S.Ct. 1355. If the governmental display endorses religion then the constitutionally impermissible message must be removed, as it attacks this nation's "history and tradition of religious diversity that dates from the settlement of the North American Continent" and "the religious diversity that is our national heritage." *Id.* at 589, 109 S.Ct. 3086. Here, the display communicates a governmental endorsement not only of religion over non-religion, but of the particular religion, Christianity, [9] whose message is contained within the display. Both in the impetus for its creation and the manner in which it was assembled, the display evidences a governmental purpose and effect of endorsing Christianity, and therefore the display

[9] Notably, the defendants did not post a Hebrew version of the Ten Commandments and in selecting a version of the Ten Commandments had to choose among several differing translations, some favored by particular Christian sects over others. The other documents in the display reinforce its distinctly Christian theme. To the extent that the displayed version of the Ten Commandments may be favored by one sect over another, the display runs further afoul of the Establishment Clause because it infringes upon the "sectarian differences among various Christian denominations [that] were central to the origins of our Republic." *Allegheny*, 492 U.S. at 589, 109 S.Ct. 3086.

violates the Establishment Clause of the First Amendment. Thus, the court concludes that the plaintiffs have shown a strong likelihood of success on the merits.

2. Irreparable Harm

The loss of First Amendment freedoms and the violation of an individual's First Amendment rights "for even minimal periods of time [ ] unquestionably constitute[ ] irreparable injury." *Connection Distrib.*, 154 F.3d at 288, citing *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality). *See also Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir.1995). Thus the plaintiffs here have shown that failure to grant the relief sought will result in their suffering irreparable harm.

3. Harm to Others

If the court grants the preliminary injunction sought by the plaintiffs, the defendants will be required to remove the religious display from the site upon which it is posted. This will require little expense. Should the defendants be successful at a trial on the merits, they may construct the display again at little expense.

The defendants argue that an order requiring the removal of the Ten Commandments and accompanying documents would infringe on their First Amendment right to free speech and would be tantamount to censorship. The defendants' concerns, however, are misplaced. Greene's official actions as McCreary County Judge Executive are distinguishable from those of private citizens. Greene's actions are subject to First Amendment scrutiny because he acted in his official

capacity as Judge Executive when he posted the Ten Commandments and later when he revised the display in the McCreary County Courthouse. The Establishment Clause of the First Amendment restricts the conduct of the government and its agents, not of private citizens. *Allegheny*, 492 U.S. at 590, 109 S.Ct. 3086. Thus, the action of a government official creating such an exhibit in a public area of a courthouse is analytically distinct from that of a private citizen who, for example, posts a copy of the Ten Commandments in his own home, in his front yard, or in his private business. The private citizen's actions do not implicate the Establishment Clause of the First Amendment. The speech at issue here was not that of private citizens, but of the government itself.[10] Thus, the removal of the display at issue here will not infringe upon the defendants' First Amendment free speech rights. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993).

Rather than limiting the religious speech of private citizens, the First Amendment ensures, in two separate ways, the freedom to engage in such speech and in doing so protects the public's interest. First, "private religious speech, far from being a First Amendment orphan, is as fully protected under

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[10] The court notes, however, that Greene and McCreary County cannot avoid the strictures of the Establishment Clause by allowing private citizens or religious organizations to post a Ten Commandments display in the courthouse. To do so would simply show "that the government is endorsing the religious message of that organization, rather than communicating a religious message of its own .... It also prohibits the government's support and promotion of religious communications by religious organizations." *Allegheny*, 492 U.S. at 600, 109 S.Ct. 3086.

the Free Speech Clause as secular private expression." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 760, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995). Thus, the Free Speech Clause would, for example, preclude a county government from fining a private citizen for carrying a copy of the Ten Commandments or discussing the Ten Commandments with others. Second--and more central to the case at hand--the Establishment Clause guarantees that private citizens can think and speak freely on religious matters without fear of government coercion or penalty. Absent the Establishment Clause, a county government could pass an ordinance requiring all county residents to adhere to a certain religious sect or practice or to abstain from all religious acts. For example, the government could require all citizens to convert to islam on threat of imprisonment or could heavily fine anyone who entered a church. Clearly, such governmental conduct is at odds with the United States Constitution, which established this nation as a democracy, not as a theocracy. Subtler forms of government-sanctioned religious intolerance also serve to limit freedom of religious thought, speech, and practice and are therefore unconstitutional.

4. The Public Interest

As explained above, the protection of First Amendment rights and vindication of constitutional violations is always in the public's interest. *Connection Distrib.*, 154 F.3d at 288; *Dayton Area Visually Impaired*, 70 F.3d at 1490; *G & V. Lounge, Inc.*, 23 F.3d at 1079. Accordingly,

IT IS ORDERED that the plaintiffs' motion for a preliminary injunction is GRANTED.

IT IS FURTHER ORDERED that the defendants' motion to dismiss is DENIED.

IT IS FURTHER ORDERED that the Ten Commandments display shall be removed from the McCreary County Courthouse IMMEDIATELY.

IT IS FURTHER ORDERED that neither the defendant Jimmie Greene nor any other McCreary County official, acting in their official capacity, shall erect or cause to be erected similar displays within McCreary County, Kentucky.

This is the 5th day of May 2000.

/s JENNIFER B. COFFMAN
Jennifer B. Coffman, Judge
United States District Court
Eastern District of Kentucky

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION

CIVIL ACTION NO. 99-509

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, et al.,
PLAINTIFFS,
vs.
PULASKI COUNTY, KENTUCKY, et al.
DEFENDANTS.

ORDER

COFFMAN, District Judge.

This matter, which presents a First Amendment challenge to a display of the Ten Commandments and other documents,[1]

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[1] The subject display originally included only the Ten Commandments. Because the court here concludes that later modification of the exhibit was merely a futile attempt to render constitutional the original Ten Commandments display, that alteration was analytically meaningless when measured by the Establishment Clause of the First Amendment. The court thus uses interchangeably the terms "Ten Commandments display," "religious display," "display of the Ten Commandments and other documents," and similar phrases to describe the exhibit here at

is before the court upon the plaintiffs' motion for a preliminary injunction and the defendants' motion to dismiss. This court held a hearing on April 20, 2000 and, having reviewed the arguments of counsel and being otherwise sufficiently advised, will grant the plaintiffs' motion for a preliminary injunction and will deny the defendants' motion to dismiss.[2]

Motion to Dismiss

For the reasons explained below, the plaintiffs have stated a claim for a First Amendment violation. The defendants also have raised two procedural grounds for their motion to dismiss, arguing that the plaintiffs lack standing to bring their claims and that they were ineffectually served.

The defendants contend that the plaintiffs lack standing to bring these actions because they have not alleged "injuries in fact." The injury-in-fact component of standing requires a plaintiff to have a personal stake in the matter to be

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issue.

[2] This is one of three companion cases, simultaneously filed, which attack such displays. Any minimal variances among the three displays possess no legal significance for the purpose of the motions now pending before the court. Having observed that the case records also share similar complaints, memoranda, and motions and that the three cases share identical lead counsel on both sides, the court combined the three for oral argument and today enters virtually identical opinions--with necessary but slight factual variations--in all three.

adjudicated. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The defendants correctly note that abstract or hypothetical injuries are insufficient. *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974). The plaintiffs in this lawsuit, however, have suffered and are under the threat of suffering concrete injuries.

In *Washegesic v. Bloomingdale Public Sch.*, 33 F.3d 679, 683 (6th Cir.1994), the court considered a challenge to a public school's display of a portrait of Jesus. A former student was determined to have standing because he would come into unwelcome direct contact with the display while visiting the school to attend sporting events or meet former teachers. *Id.* The court held that even a member of the PTA or of the public would have standing if she attended events in the school and "took the portrait as a serious insult to her religious sensibilities." *Id.* Like the plaintiff in that case, the plaintiffs here have standing because they must come into contact with the display of the Ten Commandments whenever they enter the courthouse to conduct business.

The defendants cite several Seventh Circuit cases holding that in order to have standing in an Establishment Clause challenge, a plaintiff must undertake a special burden or alter his or her normal routine to avoid the offensive object. In *Gonzales v. North Township of Lake County, Ind.*, 4 F.3d 1412 (7th Cir.1993), for example, the plaintiffs challenged the presence of a crucifix in their city's park. The plaintiffs' discontinued use of an area within the park conferred standing. *Id.* at 1417. Here, the plaintiffs have not specifically alleged that the display has forced them to alter their normal routines. The necessary alterations would be highly

impractical, however, because they must enter the courthouse to conduct civic business, and therefore the individual plaintiffs have met the standing requirement for their First Amendment claim.

The defendants' claim that the American Civil Liberties Union ("ACLU") lacks organizational standing likewise must be rejected. In *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977), the Supreme Court held:

> Even in the absence of injury to itself, an association may have standing solely as the representative of its members .... The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit .... So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction.

Id. at 342, 97 S.Ct. 2434, quoting *Warth v. Seldin*, 422 U.S. 490, 511, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Here, the ACLU has members in Pulaski County who would have standing for the same reason that the named plaintiffs have standing. Furthermore, this lawsuit will not require the individual participation of ACLU members. Thus, the ACLU has organizational standing.

The defendants next claim that they were not properly served under Fed. R. Civ.P. 4. Rule 4(j)(2) provides that a county may be served "by serving the summons and complaint in the manner prescribed by law of that state for the service of summons." The Kentucky Rules of Civil Procedure allow a summons to be served by mail. Ky.R.Civ.P. 4.01(a). Under the Kentucky rule, the clerk of court actually mails the summons. Here, the plaintiffs placed the summons in the mail themselves, and the defendants argue that the service was ineffective because the clerk of court did not place the summons in the mail. The federal clerks of court do not, however, place summons in the mail for plaintiffs. The Federal Rules of Civil Procedure permit service "in the manner" allowed by their state counterparts--here, mailing. That the plaintiffs rather than a clerk of court mailed the summons does not render it ineffective. Accordingly, the defendants' motion to dismiss will be denied.

Preliminary Injunction

A preliminary injunction preserves the relative positions of the parties until a trial on the merits can be held. *Univ. of Texas v. Camenisch*, 451 U.S. 390, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981). To receive a preliminary injunction, a plaintiff must establish: (1) a strong or substantial likelihood of success on the merits; (2) that he or she will suffer irreparable harm in the absence of an injunction; (3) that others will not suffer substantial harm if the injunction is granted; and (4) that an injunction will serve the public interest. *Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir.1998). These four factors guide the discretion of the court and are not unbending prerequisites. *Id.*

A party need not prove his case in full at a preliminary-injunction hearing. *Camenisch,* 451 U.S. at 395, 101 S.Ct. 1830. The court must, however, make findings of fact and conclusions of law, which are not binding at a trial on the merits, *United States v. Owens,* 54 F.3d 271, 277 (6th Cir.1995), when deciding a motion for a preliminary injunction. The court need not make specific findings of fact regarding each of the four factors if fewer are dispositive. *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1076 (6th Cir.1994). In a case brought under the First Amendment, the likelihood of success on the merits frequently may be the determinative factor. *Connection Distrib.*, 154 F.3d at 288.

Findings of Fact

Pulaski County officials recently erected in the Pulaski County courthouse a Ten Commandments display, hung by the defendant Darrell Beshears, the Pulaski County Judge Executive. When this suit was filed, the display consisted of at least one framed copy of one version of the Ten Commandments and was not part of any larger educational, historical, or retrospective exhibit. After this lawsuit was filed, the defendants amended the display to include several other documents.[3] At oral argument, the defendants conceded that they did so in an attempt to bring the display within the

[3] The defendants argue that because they altered the display, theplaintiffs' complaint is moot. Their argument fails because the new display is effectively a continuation of the original display, and the plaintiffs raise the same objections to the amended display.

parameters of the First Amendment and to insulate themselves from suit. The display, both in its original form and as amended, is readily visible to the plaintiffs and the other county citizens who use the courthouse to conduct their civic business, to obtain or renew driver's licenses and permits, to register cars, to pay local taxes, and to register to vote.

As it now exists,[4] the display consists of (1) an excerpt from the Declaration of Independence; (2) the Preamble to the Constitution of Kentucky; (3) the national motto of "In God We Trust"; (4) a page from the Congressional Record of Wednesday, February 2, 1983, Vol. 129, No. 8, declaring it the Year of the Bible and including a copy of the Ten Commandments; (5) a proclamation by President Abraham Lincoln designating April 30, 1863 a National Day of Prayer and Humiliation; (6) an excerpt from President Lincoln's "Reply to Loyal Colored People of Baltimore upon Presentation of a Bible" reading, "The Bible is the best gift God has ever given to man."; (7) a proclamation by President Ronald Reagan marking 1983 the Year of the Bible; and (8) the Mayflower Compact. While some of the documents are

[4] At oral argument, it appeared that the original exhibit of the Ten Commandments was removed and replaced with the text of the Congressional Record which includes a copy of those Commandments. The exhibits attached to the defendants' brief, however, include a photograph of the Pulaski County Courthouse display in which the large framed copy of the Ten Commandments remains, with the other, smaller documents hanging to one side. For the purposes of this motion, either scenario produces the same result.

displayed in their entirety, the defendants have excerpted a small portion of others to include only that document's reference to God or the Bible with little or no surrounding text.

Conclusions of Law

1. Likelihood Of Success On The Merits

The plaintiffs seek injunctive and declaratory relief under 42 U.S.C. § 1983, arguing that the continued posting of the Ten Commandments in the Pulaski County courthouse violates their First Amendment rights. Section 1983 creates a federal cause of action against any person who, acting under color of state law, deprives another of his federal rights. *See Conn v. Gabbert*, 526 U.S. 286, 290, 119 S.Ct. 1292, 143 L.Ed.2d 399 (1999). Section 1983 does not create separate substantive rights, but merely provides a method of vindicating independently conferred federal rights. *Albright v. Oliver*, 510 U.S. 266, 271, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994). A plaintiff must allege two elements to establish a prima facie case under § 1983:(1) that the action occurred "under color of law"; and (2) that the action was a deprivation of a constitutional right or a federal statutory right. *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). In a § 1983 case brought against a defendant in his official capacity, the governmental entity is liable under § 1983 only when the entity itself is a "moving force" behind the deprivation; thus, in an official-capacity suit, the entity's policy or custom must have played a part in the violation of federal law. *Kentucky v. Graham*, 473 U.S. 159, 166, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985).

Here, the plaintiffs have shown a substantial likelihood of success on the merits for both elements required by a § 1983 claim. First, Darrell Beshears acted under color of state law[5] and in his capacity as County Judge Executive when he posted the Ten Commandments in the courthouse. Beshears possessed policy-making authority, so that his posting of the Ten Commandments constituted official Pulaski County policy. That policy serves as a driving force behind the constitutional violations alleged in this case. See Pembaur v. City of Cincinnati, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986).

Second, violations of the First Amendment such as those alleged in this case are remediable through a § 1983 claim. The First Amendment declares, "Congress shall make no law respecting an establishment of religion...." U.S. Const. amend I. Pursuant to the Establishment Clause of the First Amendment, governmental bodies may not "take a position on questions of religious belief or [make] adherence to a religion relevant in any way to a person's standing in the political community." *County of Allegheny v. ACLU*, 492

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[5] A § 1983 defendant acts under color of state law when he exercises power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *West v. Atkins*, 487 U.S. 42, 49, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988); *United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941). Indeed, Beshears's activities must be subjected to First Amendment scrutiny because in hanging the Ten Commandments in the courthouse, he acted as a public, government official, not as a private citizen. *See County of Allegheny v. ACLU*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989).

U.S. 573, 594, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984)) (O'Connor, J., concurring). Government actions challenged under the Establishment Clause are reviewed under the three-part test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). Under *Lemon*, the governmental action first must have a secular purpose and "second, its principal or primary effect must be one that neither advances nor inhibits religion." Finally, the governmental action must not result in "excessive governmental entanglement with religion." *Id.* at 612-13, 91 S.Ct. 2105. In the past decade, the Supreme Court has reframed the *Lemon* analysis, focusing on whether either the purpose or the effect of the challenged governmental action results in the endorsement of religion. *Edwards v. Aguillard*, 482 U.S. 578, 585, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987). Courts in this circuit treat the endorsement test as a refinement or clarification of the *Lemon* analysis, *Granzeier v. Middleton*, 173 F.3d 568, 573 (6th Cir.1999), and this court will apply that test to decide whether the Ten Commandments display, both in its original form and as amended, passes constitutional muster.

The endorsement test forecloses governmental action that "a reasonable observer would think is an endorsement of religion by the government." *Id.* Justice O'Connor formulated the endorsement test, explaining:

> The purpose prong of the Lemon test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid.

Lynch, 465 U.S. at 690, 104 S.Ct. 1355 (O'Connor, J., concurring).[6] In other words, the challenged conduct must have both an actual secular purpose and also the effect of neither advancing nor hindering religion. Because the government's use of a religious reference or of an object with religious meaning may be appropriate under some circumstances but not in others, the court must assess the constitutionality of government conduct with careful attention to the manner and context of the action. *Compare Allegheny*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472, with *Lynch*, 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (display of creche held unconstitutional in former but constitutional in latter).

The purpose prong of the endorsement analysis asks whether a secular purpose actually motivated the government's action.

> In considering the purpose prong ... the focus of the inquiry is on the intentions of the government. Namely, did the government intend to convey a message of endorsement or disapproval of religion when it implemented the challenged policy. Courts should generally be deferential to the government's articulation of a secular purpose. The government's secular purpose, however, must be sincere and not a

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[6] The endorsement test was adopted by a majority of the Court in *Allegheny*, 492 U.S. at 595, 109 S.Ct. 3086.

> mere sham. Although the government's purpose need not be exclusively secular, a practice will violate the Establishment Clause if it is entirely motivated by a purpose to advance religion.

Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 384 (6th Cir.1999), citing *Edwards v. Aguillard*, 482 U.S. 578, 585-86, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987); *Lynch*, 465 U.S. at 681 n. 6, 104 S.Ct. 1355; *Wallace v. Jaffree*, 472 U.S. 38, 56, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985). *See Granzeier*, 173 F.3d at 574. Here, the court will look to the County's proffered purpose, the brief history of the Ten Commandments display, and the display itself to determine whether the display serves an actual, secular purpose.

In its original form, the Ten Commandments display, consisting only of the Commandments unaccompanied by any other documents, lacks any secular purpose. The Ten Commandments are a distinctly religious document, believed by many Christians and Jews to be the direct and revealed word of God, and their very nature precludes a finding of a prevailingly secular purpose here. Indeed, "the pre-eminent purpose for posting the Ten Commandments ... is plainly religious in nature." *Stone v. Graham*, 449 U.S. 39, 41, 101 S.Ct. 192, 66 L.Ed.2d 199 (1980).[7]

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[7] While the defendants suggest that *Stone* is inapplicable here because it dealt with legislative action and declared the posting of the Ten Commandments to be unconstitutional without the benefit of full briefing, it nevertheless is still good law and this court is bound by its precedential value. The court cites the case today merely to establish that the Ten Commandments are a distinctly religious text and that their posting has a religious

> The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. See Exodus 20:12-17; Deuteronomy 5:16-21.. Rather, the first part of the Commandments concerns the religious duties of believers: worshiping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day. See Exodus 20:1-11; Deuteronomy 5:6-15.

Id. at 41-42, 101 S.Ct. 192. In their briefs and at oral argument, the defendants suggest that the Ten Commandments were posted in order to teach Pulaski County residents about American religious history and the foundations of the modern state. The defendants also concede that the display purports to demonstrate America's Christian heritage.[8] The narrow scope of the display--a single religious

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purpose.

[8] Such an overtly Christian purpose violates the Establishment clause. While the court recognizes that the Christian tradition has played an important role in American culture, the defendants' reliance on *Church of the Holy Trinity v. United States*, 143 U.S. 457, 12 S.Ct. 511, 36 L.Ed. 226 (1892), is misplaced. In that case, the Supreme Court examined whether a service contract between an incorporated church and a foreign minister fell within the purview of a statute regulating the import of foreign laborers. The Court's analysis focused upon and delineated rules of statutory construction and did not entail First Amendment jurisprudence. Indeed, the language cited by the

text unaccompanied by any interpretation explaining its role as a foundational document--can hardly be said to present meaningfully the story of this country's religious traditions, and for this court to conclude that the original display had a secular purpose belies reason.

The challenged display now includes other documents which the defendants argue illustrate the display's secular purpose: the education of Pulaski County residents concerning American religious history. As the Supreme Court has made abundantly clear in its articulation of the endorsement test, the court must examine the actual purpose of the use of the religious objects and should not blindly accept an allegedly secular purpose which is contrary to the facts of the case. Furthermore, the requirement of a secular purpose "is not satisfied ... by the mere existence of some secular purpose, however dominated by religious purposes." *Lynch*, 465 U.S. at 691, 104 S.Ct. 1355 (O'Connor, J., concurring). While the government's stated purpose may be entitled to some deference, the history of the display here and the choice of documents in the display contradict the County's assertion. That the display originally consisted solely of the Ten Commandments and that it was altered--albeit without any legally significant change--only after this lawsuit was filed weigh heavily against the finding of a secular purpose.

Likewise, a review of the documents themselves forecloses a characterization of the purpose of the display as

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defendants is dicta and is neither that Court's ruling nor vital to its ruling.

secular. The County narrowly tailored its selection of foundational documents to incorporate only those with specific references to Christianity and texts that, while promulgated by the federal government, were chosen solely for their religious references. The display does not appear to have been intended to educate Pulaski County residents, in a balanced or accurate manner, about the traditions and texts that were drawn upon by this nation's founders or about the complex role religion has played in this country's history. In short, as shown by the facts of the case and the display itself, the exhibit--both in its original form and as altered--serves no secular purpose, nor was it ever intended to do so. As the display clearly lacks a secular purpose, it violates the First Amendment and the court's analysis need go no further. *See Wallace*, 472 U.S. at 56, 105 S.Ct. 2479. The court, however, will complete the *Lemon* analysis to determine whether the effect of the display also violates the Establishment Clause.

In determining such an effect, the court must ask whether an objective observer acquainted with the display would perceive it as a governmental endorsement of religion. *See ACLU v. Capitol Square Review and Advisory Bd.*, 210 F.3d 703 (6th Cir.2000). The objective-observer standard parallels the reasonable-person standard in torts law; the question is not whether one particular, uninformed, subjective observer would view the display as an endorsement of religion but whether an objective, knowledgeable, reasonable observer would do so. Here, the prevailing effect of the display is one of governmental endorsement of religion.

The overriding theme of each individual document as presented in the display and of the display as a whole is one of religion and more specifically of Christianity. The first

document is a copy of the Congressional Record from February 2, 1983, proclaiming that year the Year of the Bible and reflecting the remarks of Representative Phillip M. Crane about his personal beliefs concerning the importance of the Bible and the Ten Commandments, a version of which is included in the remarks. The next document consists of two brief excerpts: one from the Declaration of Independence, "All men ... are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness," and one from the Constitution of Kentucky, "We, the people of the Commonwealth of Kentucky, grateful to Almighty God for the civil, political and religious liberties we enjoy, and invoking the continuance of these blessings, do ordain and establish this Constitution." The next document is President Lincoln's Proclamation of a Day of Prayer. Issued in 1863, it confesses to God and seeks forgiveness for the national sins committed during the Civil War. Another presidential proclamation follows, from President Reagan, declaring 1983 the Year of the Bible in honor of its influence in shaping America. A copy of the Mayflower Compact follows, in which the colony's founders invoke "the name of God" and explain that their journey was taken, among other reasons, "for the glory of God and advancement of the Christian faith." Finally, bearing a picture of Abraham Lincoln, the next states, "The Bible is the best gift God has ever given to man."

While a display of some of these documents may not have the effect of endorsing religion in another context, they collectively have the overwhelming effect of endorsing religion, in the context of this display. No reasonable observer of the display could conclude otherwise. Each and every document refers to religion. Several have been edited to

include only their religious references. Indeed, the only unifying element among the documents is their reference to God, the Bible, or religion. Furthermore, the display lacks an explanation of the documents' historical significance or of the reasons for their references to religion. Removed from their historical context and placed with other documents with which the only common link is religion, the documents have the undeniable effect of endorsing religion.

The defendants argue that the display cannot be held to violate the First Amendment because it includes excerpts from texts which have been held to be constitutional despite references to God or religion. They point specifically to this nation's motto of "In God We Trust" and the phrase "one nation under God" found in the Pledge of Allegiance. The defendants' argument, however, fails. First, as to several of the documents, the defendants did not include the entire text or even a meaningful section of each text. Rather, they narrowly extracted only the sections directly mentioning God. This effectively changed the meaning and significance of each of the documents from the original, particularly when read in conjunction with the rest of the Ten Commandments display. Second, and more generally, in upholding examples of ceremonial deism, such as the phrase "In God We Trust," courts have pointed to the long-standing existence of such phrases as well as their non-sectarian nature, concluding that "a reasonable observer, aware of the purpose, context, and history of the phrase ..., would not consider its use ... to be an endorsement of religion." *ACLU v. Capitol Square Review and Advisory Bd.*, 210 F.3d 703, 721, quoting *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir.1996). *See Allegheny*, 492 U.S. at 602-04, 109 S.Ct. 3086. Here, there is neither a long-standing tradition of posting the Ten

Commandments in county courthouses nor any secular purpose for doing so. As the court has explained, a reasonable observer would conclude that the Ten Commandments display represents a governmental endorsement of religion, rather than merely a traditional manner of solemnizing a government meeting or giving a stamp of legitimacy to national currency. To the extent the defendants have invited this court to break with precedent and hold that the posting of the Ten Commandments should be viewed as only another example of ceremonial deism, the court declines to do so.

The defendants direct the court's attention to three cases in which other courts held Ten Commandments displays to be constitutional. All three of the cases are distinguishable from this case. In *Books v. City of Elkhart, Ind.*, 79 F.Supp.2d 979 (N.D.Ind.1999), the district court held that a fifty-eight-year-old stone monument containing, among other things, a copy of the Ten Commandments, did not violate the Establishment Clause. The monument was merely one of several historical and cultural plaques and memorials, all donated by private parties, standing on the edges of a city-owned lot, removed from government buildings. *Anderson v. Salt Lake City Corp.*, 475 F.2d 29 (10th Cir.1973), considered an identical memorial, which it held to be constitutional. That opinion, however, has been called into question by the Tenth Circuit, which noted that it was decided before Stone and which commented that "more recent cases [cast] doubt on the validity of our conclusion that the Ten Commandments monolith is primarily secular in nature." *Summum v. Callaghan*, 130 F.3d 906, 910 n. 10 (10th Cir.1997)(decided on grounds of freedom of speech). Here, the Ten Commandments display is not in an area with other memorials and is not incorporated as part of a larger, secular

sculpture or display. Furthermore, the court's holding in Elkhart that the Ten Commandments should be considered to be secular is by no means definitive in light of the Supreme Court's holding in *Stone*, and the holding in *Elkhart* was largely dependent upon the manner in which the Commandments were displayed, differing greatly from the Ten Commandments display here.

Similarly, in *Suhre v. Haywood County, N.C.*, 55 F.Supp.2d 384 (W.D.N.C.1999), the court held that a granite frieze in a courthouse did not violate the Establishment Clause. That sculpture recounted the historical development of the law, with images of "the blind Goddess of Justice, now called Lady Justice[,] ... ancient gods and goddesses, and the laws of Rome and the Tribes of Israel." *Id.* at 386. On either side of Lady Justice, who bears the Scales of Justice in one hand and holds the Sword of Justice in another, were two marble plaques bearing the Ten Commandments. The court noted that the courthouse had been entered into the National Register of Historic Places by the United States Department of the Interior, with special note paid to the sculpture, which could not be removed without its destruction. The court held that the purpose in sculpting the frieze was to display artistically the history of ethics, civilization, and the law, and that when viewed as a whole the sculpture did not communicate a governmental endorsement of religion. Again, the Ten Commandments display challenged here is not part of some larger artistic rendering or academic display encompassing a wide range of cultural, religious, and legal traditions. Instead, it is a narrowly tailored display, intended to convey and having the effect of conveying a very specific governmental endorsement of religion.

The First Amendment will not permit such an endorsement, as "it sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *Allegheny*, 492 U.S. at 595, 109 S.Ct. 3086, quoting *Lynch*, 465 U.S. at 688, 104 S.Ct. 1355. If the governmental display endorses religion then the constitutionally impermissible message must be removed, as it attacks this nation's "history and tradition of religious diversity that dates from the settlement of the North American Continent" and "the religious diversity that is our national heritage." *Id.* at 589, 109 S.Ct. 3086. Here, the display communicates a governmental endorsement not only of religion over non-religion, but of the particular religion, Christianity,[9] whose message is contained within the display. Both in the impetus for its creation and the manner in which it was assembled, the display evidences a governmental purpose and effect of endorsing Christianity, and therefore the display violates the Establishment Clause of the First Amendment. Thus, the court concludes that the plaintiffs have shown a

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[9] Notably, the defendants did not post a Hebrew version of the Ten Commandments and in selecting a version of the Ten Commandments had to choose among several differing translations, some favored by particular Christian sects over others. The other documents in the display reinforce its distinctly Christian theme. To the extent that the displayed version of the Ten Commandments may be favored by one sect over another, the display runs further afoul of the Establishment Clause because it infringes upon the "sectarian differences among various Christian denominations [that] were central to the origins of our Republic." *Allegheny*, 492 U.S. at 589, 109 S.Ct. 3086.

strong likelihood of success on the merits.

2. Irreparable Harm

The loss of First Amendment freedoms and the violation of an individual's First Amendment rights "for even minimal periods of time [ ] unquestionably constitute[ ] irreparable injury." *Connection Distrib.*, 154 F.3d at 288, citing *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality). *See also Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir.1995). Thus the plaintiffs here have shown that failure to grant the relief sought will result in their suffering irreparable harm.

3. Harm to Others

If the court grants the preliminary injunction sought by the plaintiffs, the defendants will be required to remove the religious display from the site upon which it is posted. This will require little expense. Should the defendants be successful at a trial on the merits, they may construct the display again at little expense.

The defendants argue that an order requiring the removal of the Ten Commandments and accompanying documents would infringe on their First Amendment right to free speech and would be tantamount to censorship. The defendants' concerns, however, are misplaced. Beshears's official actions as Pulaski County Judge Executive are distinguishable from those of private citizens. Beshears's actions are subject to First Amendment scrutiny because he acted in his official capacity as Judge Executive when he posted the Ten Commandments and later when he revised the display in the

Pulaski County Courthouse. The Establishment Clause of the First Amendment restricts the conduct of the government and its agents, not of private citizens. *Allegheny*, 492 U.S. at 590, 109 S.Ct. 3086. Thus, the action of a government official creating such an exhibit in a public area of a courthouse is analytically distinct from that of a private citizen who, for example, posts a copy of the Ten Commandments in his own home, in his front yard, or in his private business. The private citizen's actions do not implicate the Establishment Clause of the First Amendment. The speech at issue here was not that of private citizens, but of the government itself.[10] Thus, the removal of the display at issue here will not infringe upon the defendants' First Amendment free speech rights. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993).

Rather than limiting the religious speech of private citizens, the First Amendment ensures, in two separate ways, the freedom to engage in such speech and in doing so protects the public's interest. First, "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."

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[10] The court notes, however, that Beshears and Pulaski County cannot avoid the strictures of the Establishment Clause by allowing private citizens or religious organizations to post a Ten Commandments display in the courthouse. To do so would simply show "that the government is endorsing the religious message of that organization, rather than communicating a religious message of its own.... It also prohibits the government's support and promotion of religious communications by religious organizations." *Allegheny*, 492 U.S. at 600, 109 S.Ct. 3086.

Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 760, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995). Thus, the Free Speech Clause would, for example, preclude a county government from fining a private citizen for carrying a copy of the Ten Commandments or discussing the Ten Commandments with others. Second--and more central to the case at hand--the Establishment Clause guarantees that private citizens can think and speak freely on religious matters without fear of government coercion or penalty. Absent the Establishment Clause, a county government could pass an ordinance requiring all county residents to adhere to a certain religious sect or practice or to abstain from all religious acts. For example, the government could require all citizens to convert to Islam on threat of imprisonment or could heavily fine anyone who entered a church. Clearly, such governmental conduct is at odds with the United States Constitution, which established this nation as a democracy, not as a theocracy. Subtler forms of government-sanctioned religious intolerance also serve to limit freedom of religious thought, speech, and practice and are therefore unconstitutional.

4. The Public Interest

As explained above, the protection of First Amendment rights and vindication of constitutional violations is always in the public's interest. *Connection Distrib.*, 154 F.3d at 288; *Dayton Area Visually Impaired*, 70 F.3d at 1490; *G & V Lounge, Inc. v. Michigan Liquor Control*, 23 F.3d 1071, 1079 (6th Cir.1994). Accordingly,

IT IS ORDERED that the plaintiffs' motion for a preliminary injunction is GRANTED.

IT IS FURTHER ORDERED that the defendants' motion to dismiss is DENIED.

IT IS FURTHER ORDERED that the Ten Commandments display shall be removed from the Pulaski County Courthouse IMMEDIATELY.

IT IS FURTHER ORDERED that neither the defendant Darrell Beshears nor any other Pulaski County official, acting in their official capacity, shall erect or cause to be erected similar displays within Pulaski County, Kentucky.

This is the 5th day of May 2000.

/s JENNIFER B. COFFMAN
Jennifer B. Coffman, Judge
United States District Court
Eastern District of Kentucky

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 01-5935

AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, ET AL.,

PLAINTIFFS-APPELLEES,

V.

MCCREARY COUNTY, KENTUCKY, ET AL.

DEFENDANTS-APPELLANTS.

Appeal from the United States District Court
for the Eastern District of Kentucky at London.
Filed: March 23, 2004
Before: RYAN, CLAY, and GIBBONS, Circuit Judges.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original

panel members but also to all other active judges of this court, and less than a majority of the judges having favored the suggestion, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Clerk

CLAY, Circuit Judge, concurring in denial of rehearing en banc, joined by Martin, J.

In *Stone v. Graham*, 449 U.S. 39 (1980)(per curiam), the Supreme Court held that it was patently insufficient for the government to justify schoolhouse displays of the Ten Commandments merely by asserting that "[t]he secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." *Id.* at 40 n.1. The Court reasoned that posting the Ten Commandments with only this disclaimer served no "educational function." *Id.* at 42.

The Court further opined that the display may have been permissible had the Ten Commandments been "integrated into the school curriculum...in an appropriate study of history, civilization, ethics, comparative religion, or the like." *Id.* (citation omitted). This statement was a critical component of the Court's holding. Indeed, the Supreme Court expressly endorsed this statement in *Lynch v. Donnelly*, 465 U.S. 668 (1984). *See id.* at 679 (expressing approval of Stone and noting that the Stone decision "carefully pointed out that the Commandments were posted purely as a religious admonition, not 'integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like'") (quoting *Stone*, 449 U.S. at 442.). The Court further elaborated that study of the Bible or of religion, "'when presented objectively as part of a secular program of education,'" may be effected consistently with the First Amendment. *Id.* at 679-80 (quoting *Abbington Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963)).[1] Thus, both *Stone* and *Lynch* support the view that the government's presentation of the Ten Commandments, or religious messages generally, is constitutional so long as the religious messages are presented objectively and as an integral component of an overarching secular subject matter.

[1] The Court also discussed *Stone* with approval in *County of Allegheny v. ACLU*, 492 U.S. 573, 590-91 n.40 (1989) ("[T]he content of a public school's curriculum may not be based on a desire to promote religious beliefs....For the same reason, posting the Ten Commandments on the wall of a public-school classroom violates the Establishment Clause.") (citing *Stone*, *supra*; other citations omitted).

This view is manifested even in those Supreme Court decisions upholding governmental displays containing patently religious symbols, including the cases cited by the dissent – *Lynch*, supra, and *County of Allegheny v. ACLU*, supra.[2] *Lynch* approved of a Christmastime display of a creche because that symbol, as a matter of fact in that case, shared a common secular link – the holiday season – with the numerous other secular symbols included in the display. The display was permissible because the secular connection between the symbols rendered "indirect, remote and incidental" the religious message that the creche would have conveyed standing alone. *Lynch*, 465 U.S. at 683. Consistently, the Court struck down a creche display in *County of Allegheny* because the creche was the display's solitary element. *County of Allegheny*, 492 U.S. at 599 (holding that "nothing in the context of the display detracts from the creche's religious message"). In contrast, through a series of fractured opinions, a majority of the Court in *County of Allegheny* approved the display of a menorah, alongside a Christmas tree and an explanatory sign, because the overall theme conveyed by the display was one of diversity, secularism, the holiday season and/or freedom. These decisions demonstrate that the manner in which a display's

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[2] The dissent's citation to *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) is baffling. That case is irrelevant because, there, the display of a cross involved private speech, not government speech as in the case at bar. *Id.* at 760, 765 ("There is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.") (internal quotation marks, punctuation and citation omitted).

religious and secular elements integrate with one another is highly relevant to the inquiry concerning the government's purpose behind the display.[3]

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[3] A hypothetical from Justice Stevens illustrates how the thematic integration of the Ten Commandments with secular symbols or messages, or the lack thereof, can render a display containing the Ten Commandments religious or non-religious in nature:

> ... [A] carving of Moses holding the Ten Commandments, if that is the only adornment on a courtroom wall, conveys an equivocal message, perhaps of respect for Judaism, for religion in general, or for law. The addition of carvings depicting Confucius and Mohammed may honor religion, or particular religions, to an extent that the First Amendment does not tolerate any more than it does "the permanent erection of a large Latin cross on the roof of city hall." *See* post [492 U.S. at 661] (KENNEDY, J., concurring in judgment in part and dissenting in part). *Cf. Stone v. Graham*, 449 U.S. 39, 101 S. Ct. 192, 66 L.Ed.2d 199 (1980) (per curiam). Placement of secular figures such as Caesar Augustus, William Blackstone, Napoleon Bonaparte, and John Marshall alongside these three religious leaders, however, signals respect not for great proselytizers but for great lawgivers. It would be absurd to exclude such a fitting message from a courtroom, as it would to exclude religious paintings by Italian Renaissance masters from a public museum. *Cf. Lynch*, 465 U.S., at 712-713, 717, 104 S. Ct., at 1379-1380, 1382 (BRENNAN, J., dissenting).

Using this approach, the panel concluded that the documents and symbols in Defendants' displays utterly lacked a unifying secular theme. The dissent has not disputed this conclusion. Under *Stone*, Defendants' mere assertion of such a unifying theme did not render the displays' purpose secular. Moreover, neither Defendants' displays, nor their legal briefs, provided a shred of evidence to support the principal assertion in the courthouse displays that the Ten Commandments profoundly influenced the drafting of the Declaration of Independence. Defendants' schoolhouse displays did not even purport to cite to objective historical evidence, instead relying on the Harlan County School Board's subjective "belief" and "opinion" that the displays will "positively contribute to the …moral character of students" and "instill qualities desirable of the students in [their] schools." Like the display of the Ten Commandments in *Stone*, the schoolhouse displays, as a matter of fact, served no educational mission, as might have been the case had the Ten Commandments been integrated into the objective study of a secular subject matter. Defendants' posting of the Ten Commandments served no purpose but as a religious admonition. Accordingly, the content of the displays sufficiently demonstrated that Defendants' true purpose for the displays was religious.

The dissent suggests that as long as the Ten Commandments are displayed "as part of an array containing eight or nine otherwise secular, historical documents," further inquiry into Defendants' purpose must cease. This is wrong.

County of Allegheny, 492 U.S. at 652-53 (Stevens, J., concurring, in part, and dissenting, in part).

Neither the Supreme Court nor this Court has ever adopted such a facile approach to the Establishment Clause. The determination of an Establishment Clause violation is a highly fact-specific inquiry that requires a court to pay careful attention to the content and context of the display containing a religious symbol. *See, e.g., County of Allegheny*, 492 U.S. at 597 (stating that the Court's task was "to determine whether the display of the creche and the menorah, in their respective 'particular physical settings,'" has the effect of endorsing or disapproving religious beliefs"); *Adland v. Russ*, 307 F.3d 471, 481 (6th Cir. 2002) (looking at the "intended physical context" of the Ten Commandments display). The dissent's approach would require courts to ignore disingenuous governmental attempts to convey religious messages whenever it has included secular elements in its speech, no matter how unrelated those secular elements are to the religious elements. If followed to its logical conclusion, the dissent's approach would justify a classroom display of a crucifix or the Lord's Prayer, so long as surrounded by the Magna Carta, the Declaration of Independence, the Star Spangled Banner and, perhaps, excerpts from the Internal Revenue Code.

The dissent inaccurately refers to the panel's "sympathetic treatment of the district court's conclusion that the history of the defendants' earlier attempts to erect 'constitutionally invalid displays' had "imprinted the defendants' purpose, from the beginning, with an unconstitutional taint[.]"" (quoting *ACLU v. McCreary County*, 354 F.3d 438, 457 (6th Cir. 2003) (quoting *ACLU v. McCreary County*, 145 F. Supp. 2d 845, 850 (E.D. Ky. 2001)). In fact, the panel explicitly rejected the district court's heavy reliance on past conduct, instead concluding that "the history of Defendants'

involvement with the displays strongly indicated that the primary purpose was religious." *McCreary County*, 354 F.3d at 348 (emphasis added; disagreeing with the district court's decision "to afford exclusive weight to Defendants' past conduct without addressing the specific content of the revised displays"). Although not dispositive of the issue, Defendants' prior unconstitutional conduct (initially displaying the Ten Commandments alone, in clear violation of *Stone*, then subsequently displaying the Ten Commandments alongside documents excerpted solely for their religious content), combined with the fact that Defendants added secular material only after this litigation ensued, was relevant evidence of their purpose behind the displays' final iteration.[4] A careful reading of the panel's opinion does not support the dissent's attempt to conjure a conflict with *Granzeier v. Middleton*, 173 F.3d 568 (6th Cir. 1999).

Finally, the dissent argues that "the lead opinion erroneously applies the heightened Establishment Clause standards for public schools to other public buildings such as courthouses." This argument is incorrect and misleading. First, the discussion of the public school and courthouse settings appeared in my separate discussion of the "endorsement" prong of the three-part test under *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Judge Gibbons did not join this aspect of my opinion and, therefore, the discussion was not adopted by a majority of the panel. It would have been

[4] This holding was justified by *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 309, 315 (2000) (looking at the "evolution" of the student-led prayer policy to determine whether an Establishment Clause violation had occurred).

inappropriate for the entire Court to review this non-binding opinion.

Second, my opinion did not equate the public school and courthouse settings for all Establishment Clause purposes. Rather, the opinion observed that citizens typically conduct business at a courthouse by necessity, many times subject to the coercive powers of the court, and, therefore, they are a captive audience, similar to public school students, who are subject to mandatory attendance requirements. Further, the fact that a courthouse is so plainly the seat of government requires courts to exercise special care to ensure that a governmental display containing religious symbols is not tantamount to governmental endorsement of those symbols. *See McCreary County*, 354 F.3d at 461.

Third, my opinion never suggested that the same concerns about governmental coercion and endorsement apply to all public buildings. As the authorities cited above hold, the inquiry into an alleged Establishment Clause violation is a highly fact-specific inquiry that depends, in part, on the particular physical setting of the speech at issue. I expressed no opinion about a display containing the Ten Commandments outside of a public school or a courthouse.

For the foregoing reasons, I concur in the decision of the en banc Court denying review of the panel opinion.

BOGGS, Chief Judge, dissenting from the denial of rehearing en banc, joined by Batchelder, J. The core question in this case is whether the district court and the panel majority

erred in holding, as a matter of law, that despite the statement of historical and patriotic secular purpose included in each display at issue here, and despite the five separate secular purposes for the displays articulated by the defendants in the district court, they nonetheless have an essentially religious purpose because the Ten Commandments appear beside eight or nine otherwise indisputably secular documents.

This court has held that in Establishment Clause cases federal courts must defer to the government's articulation of a secular purpose unless the stated purpose is shown to be a "sham." *Chaudhuri v. Tenn.*, 130 F.3d 232, 236 (6th Cir. 1997). That rule has been misapplied by the panel majority.

In coming to the conclusion that the defendants' carefully articulated secular purposes are a sham, the court ignores the First Amendment principles laid out in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), and *Lynch v. Donnelly*, 465 U.S. 668 (1984). It establishes a new and heightened standard of proof, holding that the displays lacked a secular purpose because they "provided the viewer with no analytical or historical connection between the Ten Commandments and the other historical documents." *ACLU of Ky. v. McCreary County*, 354 F.3d 438, 453 (6th Cir. 2003). Neither the Supreme Court nor this court has ever adopted such a standard. On the contrary, the Supreme Court has upheld displays of a cross, *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995) (plurality opinion), a creche, *Lynch*, 465 U.S. 668, and a menorah, *County of Allegheny*, 492 U.S. 573, none of which made explicit an "analytical or historical connection" between the religious item and other, secular items in the displays.

The implication of the court's decision is that the presence of the Ten Commandments, in an array containing indisputably historical and patriotic secular documents, converts the whole into a display having a primarily religious purpose. The panel majority appears to have drawn this rule from *Stone v. Graham*, 449 U.S. 39 (1980), a brief, per curiam disposition that preceded both *Lynch* and *Donnelly*, and that bears no meaningful factual resemblance to this case. *Stone* struck down a Kentucky statute that mandated the posting of the Ten Commandments, standing alone, in every classroom in the Commonwealth. In dicta, the Court stated that the Ten Commandments "may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like." 449 U.S. at 42 (citing *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963)) (emphasis added). I do not believe this language can be read as an attempt to state binding limits on all future constitutionally valid displays. And even if it were to be read in that aggressive fashion, *Stone* certainly does not suggest that a display that includes the Ten Commandments as part of an array containing eight or nine otherwise secular, historical documents, violates the First Amendment unless the display also provides an explicit analytical or historical connection between the clearly secular and the arguably religious items.

Another troubling aspect of the majority opinion concerns its sympathetic treatment of the district court's conclusion that the history of the defendants' earlier attempts to erect "constitutionally invalid displays" had "'imprinted the defendants' purpose, from the beginning, with an unconstitutional taint[.]'" *McCreary County*, 354 F.3d at 457 (quoting *ACLU of Ky. v, McCreary County*, 145 F. Supp. 2d 845, 850 (E.D. Ky. 2001)). I think the history of the

defendants' displays is entitled to considerably less weight than the majority gives it. Our court has previously expressed great reluctance to allow a government's past actions to taint its future actions from the standpoint of the Establishment Clause. In *Granzeier v. Middleton*, 173 F.3d 568 (6th Cir. 1999), we held that the government could close its offices on Good Friday without violating the Establishment Clause by adopting a "spring weekend" rationale, even though there was evidence that the government's purpose was originally religious, including a poster put up by a government employee depicting the Crucifixion. We stated that "the fact that a particular closing was once constitutionally suspect does not prevent it from being reinstated in a constitutional form." *Id.* at 574. Our holding in *Granzeier* reflects an important principle of equal treatment that is slighted by the panel's opinion. In general, governmental bodies, like other litigants, should be free to take instruction from prior decisions or arguments, and thus to eschew, or move away from, practices that are contrary to law.[5]

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[5] The holding and reasoning of *Granzeier* are consistent with the Supreme Court's decision in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), relied upon by the panel. While the *Santa Fe* majority considered both the "text and history" of the school policy at issue in that case, which authorized a student-elected speaker to make an "invocation" to "solemnize" home football games, *id.* at 298 & n.6, 315, it also made clear that the policy was, in fact, invalid on its face. *Id.* at 306-07, 314-15; *see id.* at 315 ("The narrow question before us is whether implementation of the October policy insulates the continuation of such prayers from constitutional scrutiny."). Moreover, the evidence of a "continuous" Establishment Clause violation, as well as other troubling aspects of the case's history, were far stronger in *Santa Fe* than in this case, where the counties have seriously rethought and reorganized their displays in response to constitutional concerns. *Cf. id.* at 294-98 (detailing various cosmetic alterations made to school district's longstanding policy of pregame and graduation prayers, which were frequently explicitly Christian in nature; also noting that the record suggested that there had been official harassment and intimidation of the Santa Fe plaintiffs during the litigation).

Finally, the lead opinion erroneously applies the heightened Establishment Clause standards for public schools to other public buildings such as courthouses. *See McCreary County*, 354 F.3d at 461. This ignores the reasons given by the Supreme Court for creating a heightened constitutional standard in public schools, namely that young children are impressionable and that the state exercises coercive power through mandatory school attendance requirements. *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987). By applying these heightened requirements to courthouses and other public buildings, the lead opinion not only misapplies the law, it also invites a new round of First Amendment challenges to religious texts and symbols that are nearly ubiquitous in non-schoolhouse public buildings throughout the nation, particularly courthouses.

The court's decision, that the Ten Commandments' text is impermissible as one of ten otherwise secular documents, gives no further guidance. Would it be permissible as one of twenty other texts, or one of one hundred? Would it make a difference if the display involved a pictorial representation, rather than a text?

I have seen at one institution what seemed to me a possible solution to some controversies of this type. There was a

representation of two tablets, bearing only the Roman numerals from "I" to "X." This left it to all observers to decide what exact text they wished to impose on that symbol. But under the court's decision, I have no idea if even this display could pass muster.

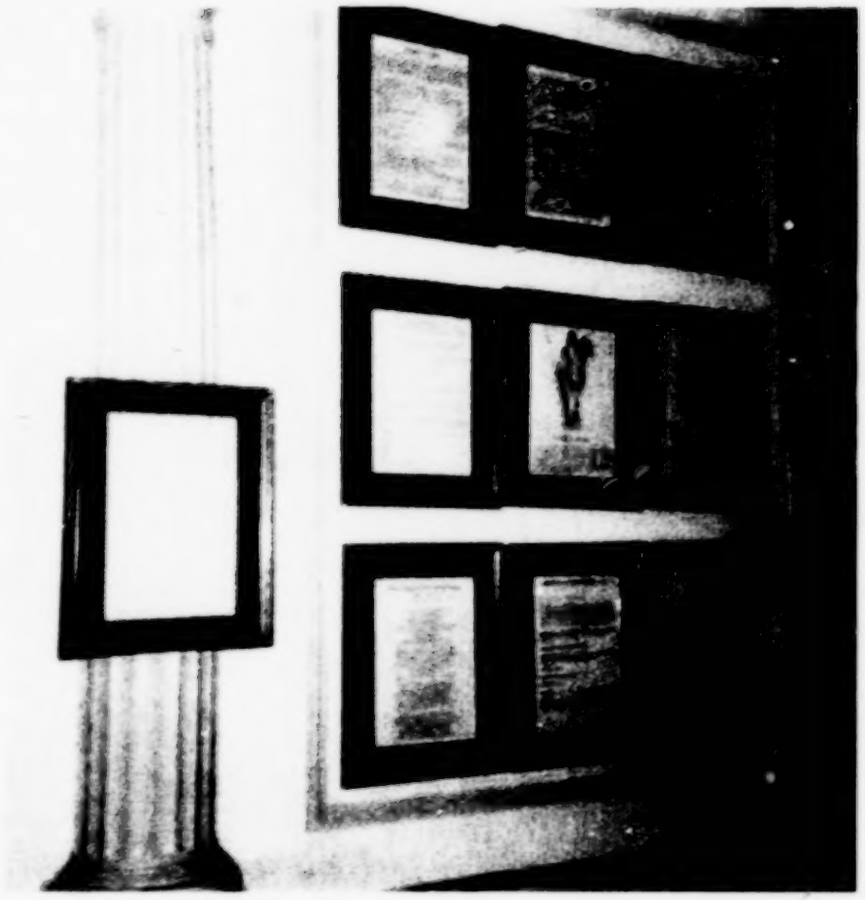
Believing the panel's decision to be both draconian and legally unsupported, I would rehear this case, so that the full court could give it more nuanced consideration. I therefore respectfully dissent from the denial of rehearing en banc.

APPENDIX F

McCREARY COUNTY DISPLAY

APPENDIX G

PULASKI COUNTY DISPLAY



APPENDIX I

EXPLANATION OF DISPLAY IN McCREARY AND PULASKI COUNTIES

FOUNDATIONS OF AMERICAN LAW AND GOVERNMENT DISPLAY

The Foundations of American Law and Government display contains documents that played a significant role in the foundation of our system of law and government. The Display contains (1) The Mayflower Compact; (2) The Declaration of Independence; (3) The Ten Commandments; (4) The Magna Carta; (5) The Star Spangled Banner; (6) The National Motto of the United States of America; (7) The Preamble to the Kentucky Constitution; (8) The Bill of Rights to the United States Constitution, and; (9) A picture of Lady Justice.

The Mayflower Compact

The Mayflower Compact was penned by William Bradford on November 11, 1620 on the Mayflower before the Pilgrims made landfall at Plymouth, Massachussetts. The Compact was the first written constitution in the New World. William Bradford described the reasoning behind the Compact when he stated in the Compact, "This day, before we came to harbour, observing some not well affected to unity and concord, but gave some appearance of faction, it was thought good there should be an association and agreement, that we should combine together in one body, and to submit to such government and governors as we should by common consent agree to make and choose, and set our hands

to this that follows, word for word. . ."

The Declaration of Independence

Perhaps the single most important document in American History, The Declaration of Independence was, as Abraham Lincoln stated, the "frame" into which the Framers placed the Constitution. The Declaration's fundamental premise is that one's right to "Life, Liberty, and the pursuit of Happiness" is not a gift of government. Government is not a giver of rights, but a protector of God-given rights. Moreover, government is a creation of "the governed" and derives all its power from the consent of its people. As the Preamble to the United States Constitution states, "We the People" *are* the government.

The Ten Commandments

The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence, which declared that "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.

The Magna Carta

In 1215, King John of England consented to the demands of his barons and agreed for Magna Carta to be publicly read

throughout the land. By this act he bound himself and "his heirs, for ever" to grant to the people of his kingdom the rights pronounced in Magna Carta. By signing Magna Carta, King John brought himself and England's future rulers within the rule of law. The rule of law places a restraint on the exercise of arbitrary government power, and it places all people and civil government under law. The American patriots, therefore, waged war against England to preserve liberties originating in 13th century England. A distinction, however, is noted between Magna Carta and the American concept of liberty. While Magna Carta is a guarantee from a king that he will follow the law, the Constitution of the United States is the establishment of a government consisting of, and created for, "We the People."

The Star Spangled Banner

Guarding the entrance to Baltimore harbor via the Patapsco River during the War of 1812, Fort McHenry faced almost certain attack by British forces. Major George Armistead, the stronghold's commander, was ready to defend the fort, but he wanted a flag that would identify his position, and one whose size would be visible to the enemy from a distance. The flag that was made for the Fort was 30 feet by 42 feet. Anxiously awaiting news of the battle's outcome was a Washington, D.C., lawyer named Francis Scott Key. Key had visited the enemy's fleet to secure the release of a Maryland doctor, who had been abducted by the British after they left Washington. The lawyer had been successful in his mission, but he could not escort the doctor home until the attack ended. So he waited on a flag-of-truce sloop anchored eight miles downstream from Fort McHenry.

During the night, there had been only occasional sounds of the fort's guns returning fire. At dawn, the British bombardment tapered off. Had the fort been captured? Placing a telescope to his eye, Key trained it on the fort's flagpole. There he saw the large garrison flag catch the morning breeze. It had been raised as a gesture of defiance, replacing the wet storm flag that had flown through the night. Thrilled by the sight of the flag and the knowledge that the fort had not fallen, Key took a letter from his pocket, and began to write some verses on the back of it. Later, after the British fleet had withdrawn, Key checked into a Baltimore hotel, and completed his poem on the defense of Fort McHenry. He then sent it to a printer for duplication on handbills, and within a few days the poem was put to the music of an old English song. Both the new song and the flag became known as "The Star-Spangled Banner" and became a rallying cry for the American Patriots during the Revolutionary War.

The National Motto

The motto was derived from the line "And this be our motto, 'In God is our trust,'" in the U.S. National Anthem, "The Star-Spangled Banner." The phrase first appeared on U.S. coins in 1864 and became obligatory on all U.S. currency in 1955. In accordance with Public Law Number 851 passed at the Second Session of the 84th Congress of the United States, July 30, 1956, the National Motto of the United States became "In God we Trust."

The Preamble to the Kentucky Constitution

The Preamble to the Kentucky Constitution derives

directly from the idea that Government is not a giver of rights, but a protector of God-given rights. Moreover, government is a creation of "the governed" and derives all its power from the consent of its people. The people, therefore, desiring a civilized society, created and ordained the Constitution of the State of Kentucky.

The Bill of Rights to the United States Constitution

During the debates on the adoption of the Constitution, its opponents repeatedly charged that the Constitution as drafted would open the way to tyranny by the central government. Fresh in their minds was the memory of the British violation of civil rights before and during the Revolution. They demanded a "bill of rights" that would spell out the immunities of individual citizens. Several state conventions in their formal ratification of the Constitution asked for such amendments; others ratified the Constitution with the understanding that the amendments would be offered. The Bill of Rights is still a vital and powerful force in American Government, shaping our laws and serving as a check on the exercise of government power.

Lady Justice

Lady Justice has become a symbol of the fair and equal administration of the law, without corruption, avarice, prejudice, or favor. The blindfold represents that our system of justice is blinded to all prejudices or favor. The scales represent that justice is administered fairly and the sword represents justice that is authoritative. Lady Justice is a symbol of the American system of justice and the ideals it embodies.

APPENDIX J
HISTORICAL DOCUMENTS AND SYMBOLS ON DISPLAY[1]

CONSTITUTION OF KENTUCY
PREAMBLE

We, the people of the Commonwealth of Kentucky, grateful to Almighty God for the civil, political and religious liberties we enjoy, and invoking the continuance of these blessings, do ordain and establish this Constitution.

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[1] The documents that follow are in the original form as they are displayed where it is possible. The text of some of the documents are included in this Appendix because including those documents in their original form as they are displayed would render the text of the documents unreadable.

THE STAR SPANGLED BANNER
The Defense of Fort McHenry
September 20, 1814
By Francis Scott Key

Oh, say can you see, by the dawn's early light,
What so proudly we hailed at the twilight's last gleaming?
Whose broad stripes and bright stars, through the perilous fight.
O'er the ramparts we watched, were so gallantly streaming?
And the rocket's red glare, the bombs bursting in air,
Gave proof through the night that our flag was still there.
O say, does that star-spangled banner yet wave
O'er the land of the free and the home of the brave?

On the shore dimly seen through the mists of the deep,
Where the foe's haughty host in dread silence reposes,
What is that which the breeze, o'er the towering steep,
As it fitfully blows, now conceals, now discloses?
Now it catches the gleam of the morning's first beam,
In full glory reflected, now shines on the stream:
'Tis the star-spangled banner: O, long may it wave
O'er the land of the free and the home of the brave!

And where is that band who so vauntingly swore
That the havoc of war and the battle's confusion,
A home and a country should leave us no more?
Their blood has washed out their foul footstep's pollution.
No refuge could save the hireling and slave
From the terror of flight or the gloom of the grave:
And the star-spangled banner in triumph doth wave

O'er the land of the free and the home of the brave.

O thus be it ever when freemen shall stand
Between their lov'd home and the war's desolation;
Blest with victory and peace, may the heaven-rescued land
Praise the Power that hath made and preserved us a nation.
Then conquer we must, for our cause it is just,
And this be our motto: "In God is our trust."
And the star-spangled banner in triumph shall wave
O'er the land of the free and the home of the brave!

LADY JUSTICE

Lady Justice has become a symbol of the fair and equal administration of the law, without corruption, avarice, prejudice, or favor. The scales represent that justice is administered fairly and the sword represents justice that is authoritative. Lady Justice is a symbol of the American system of justice and the ideals it embodies.

THE MAYFLOWER COMPACT

First Written Constitution in America

In the name of God, Amen. We, whose names are underwritten, the Loyal Subjects of our dread sovereign lord, King James, by the Grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith, etc.

Having undertaken for the Glory of God, and Advancement of the Christian Faith, and honor of our king and country, a voyage to plant the first colony in the northern parts of Virginia; do by these present, solemnly and mutually, in the Presence of God and one of another, covenant and combine ourselves together into a civil body politic, for our better ordering and preservation, and furtherance of the ends aforesaid; and by virtue hereof do enact, constitute, and frame, such just and equal laws, ordinances, acts, constitutions, officers, from time to time, as shall be thought most meet and convenient for the general good of the Colony; unto which we promise all due submission and obedience. In witness whereof we have hereunder subscribed our names, Cape Cod 11th of November, in the year of the reign of our sovereign lord King James, of England, France, and Ireland 18, and of Scotland 54, Anno Domini 1620.

THE TEN COMMANDMENTS

Thou shalt have no other gods before me.

Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water underneath the earth: Thou shalt not bow down thyself to them, nor serve them: for I the LORD thy God am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me.

Thou shalt not take the name of the LORD thy God in vain: for the LORD will not hold him guiltless that taketh his name in vain.

Remember the sabbath day, to keep it holy.

Honour thy father and they mother: that thy days may be long upon the land which the LORD thy God giveth thee.

Thou shalt not kill.

Thou shalt not commit adultery.

Thou shalt not steal.

Thou shalt not bear false witness against thy neighbour.

Thou shalt not covet they neighbour's house, thou shalt not covet they neighbour's wife, nor his manservant, nor his maidservant, nor his ox, nor his ass, nor anything that is they neighbour's.

DECLARATION OF INDEPENDENCE

The unanimous Declaration of the thirteen united States of America,

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. --That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, --That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to

provide new Guards for their future security. --Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former Systems of Government. The history of the present King of Great Britain [George III] is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

He has refused his Assent to Laws, the most wholesome and necessary for the public good.

He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public Records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.

He has refused for a long time, after such dissolutions, to cause others to be elected; whereby the Legislative powers,

incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the dangers of invasion from without, and convulsions within.

He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws for Naturalization of Foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new Appropriations of Lands.

He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers.

He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance.

He has kept among us, in times of peace, Standing Armies without the consent of our legislatures.

He has affected to render the Military independent of and superior to the Civil power.

He has combined with others to subject us to a jurisdiction foreign to our constitution and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation:

For Quartering large bodies of armed troops among us:

For protecting them, by a mock Trial, from punishment for any Murders which they should commit on the Inhabitants of these States:

For cutting off our Trade with all parts of the world:

For imposing Taxes on us without our Consent:

For depriving us, in many cases, of the benefits of Trial by Jury:

For transporting us beyond Seas to be tried for pretended offences:

For abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies:

For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments:

For suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.

He has abdicated Government here, by declaring us out of his Protection and waging War against us.

He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people.

He is at this time transporting large Armies of foreign Mercenaries to compleat the works of death, desolation and tyranny, already begun with circumstances of Cruelty and perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation.

He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the executioners of their friends and Brethren, or to fall themselves by their Hands.

He has excited domestic insurrections amongst us, and has endeavoured to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.

In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.

Nor have We been wanting in attentions to our British brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations, which, would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity, which denounces our Separation,

and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.

We, therefore, the Representatives of the united States of America, in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by the Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. And for the support of this Declaration, with a firm reliance on the protection of divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

THE BILL OF RIGHTS OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA

The Conventions of a number of the States, having at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best ensure the beneficent ends of its institution.

Resolved by the Senate and House of Representatives of the United States of America, in Congress assembled, two thirds of both Houses concurring, that the following Articles be proposed to the Legislatures of the several States, as amendments to the Constitution of the United States, all, or any of which Articles, when ratified by three fourths of the said Legislatures, to be valid to all intents and purposes, as part of the said Constitution; namely:

Amendment I
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment II
A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

Amendment III
No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and

to have the assistance of counsel for his defense.

Amendment VII
In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Amendment VIII
Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX
The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X
The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

MAGNA CARTA

John, by the grace of God King of England, Lord of Ireland, Duke of Normandy and Aquitaine, and Count of Anjou, to his archbishops, bishops, abbots, earls, barons, justices, foresters, sheriffs, stewards, servants, and to all his officials and loyal subjects, Greeting.
KNOW THAT BEFORE GOD, for the health of our soul and those of our ancestors and heirs, to the honour of God, the exaltation of the holy Church, and the better ordering of our kingdom, at the advice of our reverend fathers Stephen, archbishop of Canterbury, primate of all England, and cardinal of the holy Roman Church, Henry archbishop of Dublin, William bishop of London, Peter bishop of Winchester, Jocelin bishop of Bath and Glastonbury, Hugh bishop of Lincoln, Walter Bishop of Worcester, William bishop of Coventry, Benedict bishop of Rochester, Master Pandulf subdeacon and member of the papal household, Brother Aymeric master of the knighthood of the Temple in England, William Marshal earl of Pembroke, William earl of Salisbury, William earl of Warren, William earl of Arundel, Alan de Galloway constable of Scotland, Warin Fitz Gerald, Peter Fitz Herbert, Hubert de Burgh seneschal of Poitou, Hugh de Neville, Matthew Fitz Herbert, Thomas Basset, Alan Basset, Philip Daubeny, Robert de Roppeley, John Marshal, John Fitz Hugh, and other loyal subjects:
1. FIRST, THAT WE HAVE GRANTED TO GOD, and by this present charter have confirmed for us and our heirs in perpetuity, that the English Church shall be free, and shall have its rights undiminished, and its liberties unimpaired. That we wish this so to be observed, appears from the fact that of our own free will, before the outbreak of the present dispute between us and our barons, we granted and confirmed

by charter the freedom of the Church's elections - a right reckoned to be of the greatest necessity and importance to it - and caused this to be confirmed by Pope Innocent III. This freedom we shall observe ourselves, and desire to be observed in good faith by our heirs in perpetuity.

TO ALL FREE MEN OF OUR KINGDOM we have also granted, for us and our heirs for ever, all the liberties written out below, to have and to keep for them and their heirs, of us and our heirs:

2. If any earl, baron, or other person that holds lands directly of the Crown, for military service, shall die, and at his death his heir shall be of full age and owe a `relief', the heir shall have his inheritance on payment of the ancient scale of `relief'. That is to say, the heir or heirs of an earl shall pay £100 for the entire earl's barony, the heir or heirs of a knight l00s. at most for the entire knight's `fee', and any man that owes less shall pay less, in accordance with the ancient usage of `fees'

3. But if the heir of such a person is under age and a ward, when he comes of age he shall have his inheritance without `relief' or fine.

4. The guardian of the land of an heir who is under age shall take from it only reasonable revenues, customary dues, and feudal services. He shall do this without destruction or damage to men or property. If we have given the guardianship of the land to a sheriff, or to any person answerable to us for the revenues, and he commits destruction or damage, we will exact compensation from him, and the land shall be entrusted to two worthy and prudent men of the same `fee', who shall be answerable to us for the revenues, or to the person to whom we have assigned them. If we have given or sold to anyone the guardianship of such land, and he causes destruction or damage, he shall lose the guardianship of it, and it shall be

handed over to two worthy and prudent men of the same `fee', who shall be similarly answerable to us.

5. For so long as a guardian has guardianship of such land, he shall maintain the houses, parks, fish preserves, ponds, mills, and everything else pertaining to it, from the revenues of the land itself. When the heir comes of age, he shall restore the whole land to him, stocked with plough teams and such implements of husbandry as the season demands and the revenues from the land can reasonably bear.

6. Heirs may be given in marriage, but not to someone of lower social standing. Before a marriage takes place, it shall be' made known to the heir's next-of-kin.

7. At her husband's death, a widow may have her marriage portion and inheritance at once and without trouble. She shall pay nothing for her dower, marriage portion, or any inheritance that she and her husband held jointly on the day of his death. She may remain in her husband's house for forty days after his death, and within this period her dower shall be assigned to her.

8. No widow shall be compelled to marry, so long as she wishes to remain without a husband. But she must give security that she will not marry without royal consent, if she holds her lands of the Crown, or without the consent of whatever other lord she may hold them of.

9. Neither we nor our officials will seize any land or rent in payment of a debt, so long as the debtor has movable goods sufficient to discharge the debt. A debtor's sureties shall not be distrained upon so long as the debtor himself can discharge his debt. If, for lack of means, the debtor is unable to discharge his debt, his sureties shall be answerable for it. If they so desire, they may have the debtor's lands and rents until they have received satisfaction for the debt that they paid for him, unless the debtor can show that he has settled his

obligations to them.
10. If anyone who has borrowed a sum of money from Jews dies before the debt has been repaid, his heir shall pay no interest on the debt for so long as he remains under age, irrespective of whom he holds his lands. If such a debt falls into the hands of the Crown, it will take nothing except the principal sum specified in the bond.
11. If a man dies owing money to Jews, his wife may have her dower and pay nothing towards the debt from it. If he leaves children that are under age, their needs may also be provided for on a scale appropriate to the size of his holding of lands. The debt is to be paid out of the residue, reserving the service due to his feudal lords. Debts owed to persons other than Jews are to be dealt with similarly.
12. No `scutage' or `aid' may be levied in our kingdom without its general consent, unless it is for the ransom of our person, to make our eldest son a knight, and (once) to marry our eldest daughter. For these purposes ouly a reasonable `aid' may be levied. `Aids' from the city of London are to be treated similarly.
13. The city of London shall enjoy all its ancient liberties and free customs, both by land and by water. We also will and grant that all other cities, boroughs, towns, and ports shall enjoy all their liberties and free customs.
14. To obtain the general consent of the realm for the assessment of an `aid' - except in the three cases specified above - or a `scutage', we will cause the archbishops, bishops, abbots, earls, and greater barons to be summoned individually by letter. To those who hold lands directly of us we will cause a general summons to be issued, through the sheriffs and other officials, to come together on a fixed day (of which at least forty days notice shall be given) and at a fixed place. In all letters of summons, the cause of the summons will be

stated. When a summons has been issued, the business appointed for the day shall go forward in accordance with the resolution of those present, even if not all those who were summoned have appeared.
15. In future we will allow no one to levy an `aid' from his free men, except to ransom his person, to make his eldest son a knight, and (once) to marry his eldest daughter. For these purposes only a reasonable `aid' may be levied.
16. No man shall be forced to perform more service for a knight's `fee', or other free holding of land, than is due from it.
17. Ordinary lawsuits shall not follow the royal court around, but shall be held in a fixed place.
18. Inquests of novel disseisin, mort d'ancestor, and darrein presentment shall be taken only in their proper county court. We ourselves, or in our absence abroad our chief justice, will send two justices to each county four times a year, and these justices, with four knights of the county elected by the county itself, shall hold the assizes in the county court, on the day and in the place where the court meets.
19. If any assizes cannot be taken on the day of the county court, as many knights and freeholders shall afterwards remain behind, of those who have attended the court, as will suffice for the administration of justice, having regard to the volume of business to be done.
20. For a trivial offence, a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood. In the same way, a merchant shall be spared his merchandise, and a husbandman the implements of his husbandry, if they fall upon the mercy of a royal court. None of these fines shall be imposed except by the assessment on oath of reputable men of the neighbourhood.

21. Earls and barons shall be fined only by their equals, and in proportion to the gravity of their offence.
22. A fine imposed upon the lay property of a clerk in holy orders shall be assessed upon the same principles, without reference to the value of his ecclesiastical benefice.
23. No town or person shall be forced to build bridges over rivers except those with an ancient obligation to do so.
24. No sheriff, constable, coroners, or other royal officials are to hold lawsuits that should be held by the royal justices.
25. Every county, hundred, wapentake, and tithing shall remain at its ancient rent, without increase, except the royal demesne manors.
26. If at the death of a man who holds a lay `fee' of the Crown, a sheriff or royal official produces royal letters patent of summons for a debt due to the Crown, it shall be lawful for them to seize and list movable goods found in the lay `fee' of the dead man to the value of the debt, as assessed by worthy men. Nothing shall be removed until the whole debt is paid, when the residue shall be given over to the executors to carry out the dead man s will. If no debt is due to the Crown, all the movable goods shall be regarded as the property of the dead man, except the reasonable shares of his wife and children.
27. If a free man dies intestate, his movable goods are to be distributed by his next-of-kin and friends, under the supervision of the Church. The rights of his debtors are to be preserved.
28. No constable or other royal official shall take corn or other movable goods from any man without immediate payment, unless the seller voluntarily offers postponement of this.
29. No constable may compel a knight to pay money for castle-guard if the knight is willing to undertake the guard in person, or with reasonable excuse to supply some other fit

man to do it. A knight taken or sent on military service shall be excused from castle-guard for the period of this servlce.
30. No sheriff, royal official, or other person shall take horses or carts for transport from any free man, without his consent.
31. Neither we nor any royal official will take wood for our castle, or for any other purpose, without the consent of the owner.
32. We will not keep the lands of people convicted of felony in our hand for longer than a year and a day, after which they shall be returned to the lords of the `fees' concerned.
33. All fish-weirs shall be removed from the Thames, the Medway, and throughout the whole of England, except on the sea coast.
34. The writ called precipe shall not in future be issued to anyone in respect of any holding of land, if a free man could thereby be deprived of the right of trial in his own lord's court.
35. There shall be standard measures of wine, ale, and corn (the London quarter), throughout the kingdom. There shall also be a standard width of dyed cloth, russett, and haberject, namely two ells within the selvedges. Weights are to be standardised similarly.
36. In future nothing shall be paid or accepted for the issue of a writ of inquisition of life or limbs. It shall be given gratis, and not refused.
37. If a man holds land of the Crown by `fee-farm', `socage', or `burgage', and also holds land of someone else for knight's service, we will not have guardianship of his heir, nor of the land that belongs to the other person's `fee', by virtue of the `fee-farm', `socage', or `burgage', unless the `fee-farm' owes knight's service. We will not have the guardianship of a man's heir, or of land that he holds of someone else, by reason of any small property that he may hold of the Crown for a service of knives, arrows, or the like.

38. In future no official shall place a man on trial upon his own unsupported statement, without producing credible witnesses to the truth of it.
39. No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land.
40. To no one will we sell, to no one deny or delay right or justice.
41. All merchants may enter or leave England unharmed and without fear, and may stay or travel within it, by land or water, for purposes of trade, free from all illegal exactions, in accordance with ancient and lawful customs. This, however, does not apply in time of war to merchants from a country that is at war with us. Any such merchants found in our country at the outbreak of war shall be detained without injury to their persons or property, until we or our chief justice have discovered how our own merchants are being treated in the country at war with us. If our own merchants are safe they shall be safe too.
42. In future it shall be lawful for any man to leave and return to our kingdom unharmed and without fear, by land or water, preserving his allegiance to us, except in time of war, for some short period, for the common benefit of the realm. People that have been imprisoned or outlawed in accordance with the law of the land, people from a country that is at war with us, and merchants - who shall be dealt with as stated above - are excepted from this provision.
43. If a man holds lands of any `escheat' such as the `honour' of Wallingford, Nottingham, Boulogne, Lancaster, or of other `escheats' in our hand that are baronies, at his death his heir shall give us only the `relief' and service that he would have

made to the baron, had the barony been in the baron's hand. We will hold the `escheat' in the same manner as the baron held it.
44. People who live outside the forest need not in future appear before the royal justices of the forest in answer to general summonses, unless they are actually involved in proceedings or are sureties for someone who has been seized for a forest offence.
45. We will appoint as justices, constables, sheriffs, or other officials, only men that know the law of the realm and are minded to keep it well.
46. All barons who have founded abbeys, and have charters of English kings or ancient tenure as evidence of this, may have guardianship of them when there is no abbot, as is their due.
47. All forests that have been created in our reign shall at once be disafforested. River-banks that have been enclosed in our reign shall be treated similarly.
48. All evil customs relating to forests and warrens, foresters, warreners, sheriffs and their servants, or river-banks and their wardens, are at once to be investigated in every county by twelve sworn knights of the county, and within forty days of their enquiry the evil customs are to be abolished completely and irrevocably. But we, or our chief justice if we are not in England, are first to be informed.
49. We will at once return all hostages and charters delivered up to us by Englishmen as security for peace or for loyal service.
50. We will remove completely from their offices the kinsmen of Gerard de Athée, and in future they shall hold no offices in England. The people in question are Engelard de Cigogné', Peter, Guy, and Andrew de Chanceaux, Guy de Cigogné, Geoffrey de Martigny and his brothers, Philip Marc

and his brothers, with Geoffrey his nephew, and all their followers.

51. As soon as peace is restored, we will remove from the kingdom all the foreign knights, bowmen, their attendants, and the mercenaries that have come to it, to its harm, with horses and arms.

52. To any man whom we have deprived or dispossessed of lands, castles, liberties, or rights, without the lawful judgement of his equals, we will at once restore these. In cases of dispute the matter shall be resolved by the judgement of the twenty-five barons referred to below in the clause for securing the peace (§ 61). In cases, however, where a man was deprived or dispossessed of something without the lawful judgement of his equals by our father King Henry or our brother King Richard, and it remains in our hands or is held by others under our warranty, we shall have respite for the period commonly allowed to Crusaders, unless a lawsuit had been begun, or an enquiry had been made at our order, before we took the Cross as a Crusader. On our return from the Crusade, or if we abandon it, we will at once render justice in full.

53. We shall have similar respite in rendering justice in connexion with forests that are to be disafforested, or to remain forests, when these were first a-orested by our father Henry or our brother Richard; with the guardianship of lands in another person's `fee', when we have hitherto had this by virtue of a `fee' held of us for knight's service by a third party; and with abbeys founded in another person's `fee', in which the lord of the `fee' claims to own a right. On our return from the Crusade, or if we abandon it, we will at once do full justice to complaints about these matters.

54. No one shall be arrested or imprisoned on the appeal of a woman for the death of any person except her husband.

55. All fines that have been given to us unjustiy and against the law of the land, and all fines that we have exacted unjustly, shall be entirely remitted or the matter decided by a majority judgement of the twenty-five barons referred to below in the clause for securing the peace (§ 61) together with Stephen, archbishop of Canterbury, if he can be present, and such others as he wishes to bring with him. If the archbishop cannot be present, proceedings shall continue without him, provided that if any of the twenty-five barons has been involved in a similar suit himself, his judgement shall be set aside, and someone else chosen and sworn in his place, as a substitute for the single occasion, by the rest of the twenty-five.

56. If we have deprived or dispossessed any Welshmen of lands, liberties, or anything else in England or in Wales, without the lawful judgement of their equals, these are at once to be returned to them. A dispute on this point shall be determined in the Marches by the judgement of equals. English law shall apply to holdings of land in England, Welsh law to those in Wales, and the law of the Marches to those in the Marches. The Welsh shall treat us and ours in the same way.

57. In cases where a Welshman was deprived or dispossessed of anything, without the lawful judgement of his equals, by our father King Henry or our brother King Richard, and it remains in our hands or is held by others under our warranty, we shall have respite for the period commonly allowed to Crusaders, unless a lawsuit had been begun, or an enquiry had been made at our order, before we took the Cross as a Crusader. But on our return from the Crusade, or if we abandon it, we will at once do full justice according to the laws of Wales and the said regions.

58. We will at once return the son of Llywelyn, all Welsh

hostages, and the charters delivered to us as security for the peace.

59. With regard to the return of the sisters and hostages of Alexander, king of Scotland, his liberties and his rights, we will treat him in the same way as our other barons of England, unless it appears from the charters that we hold from his father William, formerly king of Scotland, that he should be treated otherwise. This matter shall be resolved by the judgement of his equals in our court.

60. All these customs and liberties that we have granted shall be observed in our kingdom in so far as concerns our own relations with our subjects. Let all men of our kingdom, whether clergy or laymen, observe them similarly in their relations with their own men.

61. SINCE WE HAVE GRANTED ALL THESE THINGS for God, for the better ordering of our kingdom, and to allay the discord that has arisen between us and our barons, and since we desire that they shall be enjoyed in their entirety, with lasting strength, for ever, we give and grant to the barons the following security:

The barons shall elect twenty-five of their number to keep, and cause to be observed with all their might, the peace and liberties granted and confirmed to them by this charter.

If we, our chief justice, our officials, or any of our servants offend in any respect against any man, or transgress any of the articles of the peace or of this security, and the offence is made known to four of the said twenty-five barons, they shall come to us - or in our absence from the kingdom to the chief justice - to declare it and claim immediate redress. If we, or in our absence abroad the chiefjustice, make no redress within forty days, reckoning from the day on which the offence was declared to us or to him, the four barons shall refer the matter to the rest of the twenty-five barons, who may distrain upon

and assail us in every way possible, with the support of the whole community of the land, by seizing our castles, lands, possessions, or anything else saving only our own person and those of the queen and our children, until they have secured such redress as they have determined upon. Having secured the redress, they may then resume their normal obedience to us.

Any man who so desires may take an oath to obey the commands of the twenty-five barons for the achievement of these ends, and to join with them in assailing us to the utmost of his power. We give public and free permission to take this oath to any man who so desires, and at no time will we prohibit any man from taking it. Indeed, we will compel any of our subjects who are unwilling to take it to swear it at our command.

If-one of the twenty-five barons dies or leaves the country, or is prevented in any other way from discharging his duties, the rest of them shall choose another baron in his place, at their discretion, who shall be duly sworn in as they were.

In the event of disagreement among the twenty-five barons on any matter referred to them for decision, the verdict of the majority present shall have the same validity as a unanimous verdict of the whole twenty-five, whether these were all present or some of those summoned were unwilling or unable to appear.

The twenty-five barons shall swear to obey all the above articles faithfully, and shall cause them to be obeyed by others to the best of their power.

We will not seek to procure from anyone, either by our own efforts or those of a third party, anything by which any part of these concessions or liberties might be revoked or diminished. Should such a thing be procured, it shall be null and void and

we will at no time make use of it, either ourselves or through a third party.

62.We have remitted and pardoned fully to all men any ill-will, hurt, or grudges that have arisen between us and our subjects, whether clergy or laymen, since the beginning of the dispute. We have in addition remitted fully, and for our own part have also pardoned, to all clergy and laymen any offences committed as a result of the said dispute between Easter in the sixteenth year of our reign (i.e. 1215) and the restoration of peace. In addition we have caused letters patent to be made for the barons, bearing witness to this security and to the concessions set out above, over the seals of Stephen archbishop of Canterbury, Henry archbishop of Dublin, the other bishops named above, and Master Pandulf.

63. IT IS ACCORDINGLY OUR WISH AND COMMAND that the English Church shall be free, and that men in our kingdom shall have and keep all these liberties, rights, and concessions, well and peaceably in their fulness and entirety for them and their heirs, of us and our heirs, in all things and all places for ever.

Both we and the barons have sworn that all this shall be observed in good faith and without deceit. Witness the abovementioned people and many others.

Given by our hand in the meadow that is called Runnymede, between Windsor and Staines, on the fifteenth day of June in the seventeenth year of our reign (i.e. 1215: the new regnal year began on 28 May).